# WHAT HAS HAPPENED TO THE COMMON LAW?—RECENT AMERICAN CODIFICATIONS, AND THEIR IMPACT ON JUDICIAL PRACTICE AND THE LAW'S SUBSEQUENT DEVELOPMENT

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Nineteenth-century legal academics were active participants in the nearly century-long battle over whether common law should be codified—a contest in which the *opponents* of codification ultimately prevailed. Nevertheless, a piecemeal codification of the bulk of the common law has occurred during the last sixty years, and, surprisingly, the academy has given hardly any attention to the consequences and wisdom of this recent switch from common law to code. It is time to take stock.

After clarifying what is meant by the term "codification," this Article reports the results of an extensive empirical study probing the role the Uniform Commercial Code and the Federal Rules of Evidence have played in judicial decisions. The study's findings definitively rebut some recent scholars' claims that codes have had only a negligible impact on legal practice. The study also clarifies the nature of post-code American legal reasoning.

The Article next presents a framework for assessing the jurisprudential consequences of the recent codes. By scrutinizing select drafting characteristics of the codes, and the consequent complexion of post-codification legal argument, the Article reveals how the jurisprudential fears voiced by nineteenth-century opponents of codification—that codes would strip judges of needed discretion and would freeze the law in its codified form—have not materialized.

But although the codes have not halted the growth of the law, codified law does not retain the same potential for growth characteristic of common law. The Article examines how three code characteristics have shaped significantly the development of the law in ways unanticipated by nineteenth-century opponents and unnoticed by recent commentators. Among other things, codification has bureaucratized the law, thereby inhibiting critical examination of the adversary system and the role of the jury, and has advanced an ethic of atomism at the expense of community solidarity in legal fields as diverse as contracts, evidence, and criminal law.

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## INTRODUCTION

Between the 1830s and the early twentieth century there raged a battle as to whether the common law should be codified. Advocates argued that codification was necessary to make workable the proliferation of legal materials that had collected during the first hundred years of common law adjudication.[1] Probably influenced by Jeremy Bentham's writings,[2] proponents also argued that allowing unelected judges to make

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1. *See* David D. Field, *Codification*, 20 AMER. L. REV. 1 (1886), and subsequent colloquy in that issue.

2. Bentham sought to replace hodge-podge judicial lawmaking with legislative "scientific" lawmaking, guided by principles of utilitarianism. *See* Sanford H. Kadish, *Codifiers of the Criminal Law: Wechsler's Predecessors*, 78 COLUM. L. REV. 1098, 1100-01 (1978). Bentham also argued that common law lawmaking is inconsistent with

law was inconsistent with democracy, and, therefore, codification was a necessary bulwark against what amounted to illegitimate judicial legislation.[3] Opponents of codification trumpeted the flexibility and adaptability of the common law, asserting that codes would rob judges of the discretion necessary to ensure fair results in unusual cases.[4] Opponents also feared that codes would freeze the law in its codified form, obstructing subsequent legal development.

For the most part, codification's opponents prevailed, and codifications of significant parts of the common law occurred only in the Dakota Territory, California, Idaho, Montana, and Georgia.[5] By the early twentieth century, the vociferous debates surrounding the question of whether the common law should be codified disappeared from the American juridical landscape, leading at least one prominent scholar to conclude that "[i]n the United States, the Codification movement is a nineteenth-century phenomenon."[6]

Over the last seventy-five years, however, a large-scale—though piecemeal—codification of the common law has occurred. Although the precise extent to which the common law has been codified is difficult to quantify, consider the following: of the law discussed by Oliver Wendell Holmes in *The Common Law*—contracts, criminal law, torts, bailments, wills and succession—only the law of torts remains uncodified common law.[7] The Federal Rules of Evidence codified the common law of

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democracy. *See* Bentham's Fourth Letter to the People of the United States, *in* JEREMY BENTHAM, CODIFICATION OF THE COMMON LAW 3-5 (1882) (arguing against Blackstone's portrait of the common law as "the perfection of reason" and asserting that the rules of the common law are "made" by persons who "have not any title to make law, or to join in making law," namely, "judges").

3. *See* Alexander Martin, *Codification*, 20 AMER. L. REV. 13, 14-15 (1886) ("For myself I would prefer to have no more judicial legislation. I prefer to have that function of our government performed by the department to which it belongs, under our American system.").

4. *See, e.g.*, JAMES C. CARTER, THE PROPOSED CODIFICATION OF OUR COMMON LAW (1884). For a good collection of sources regarding the debates over whether the common law should be codified, see Bruce Donald, *Codification in Common Law Systems*, 47 AUSTL. L.J. 160, 160-61 n.4 (1973).

5. Edgar Bodenheimer, *Is Codification an Outmoded Form of Legislation?*, 30 AMER. J. COMP. LAW 15, 16 (1982). Moreover, the codifications in many of these jurisdictions were short-lived victories that were soon replaced by statutes or significant common law overlays that hid the underlying codes. *See* Donald, *supra* note 4, at 161.

6. RUDOLF B. SCHLESINGER ET AL., COMPARATIVE LAW 291 n.9 (5th ed. 1988).

7. *See* OLIVER WENDELL HOLMES, THE COMMON LAW (M. Howe ed., 1963). Article 2 of the Uniform Commercial Code has codified contract law relating to the sales of goods and has been adopted by every state in the Union. Article 7 of the U.C.C. has codified a significant part of the law relating to bailments. The Uniform Probate Code has codified the common law relating to wills, intestacy, and probate, and states that have

evidence and have been substantially adopted in more than thirty states.[8] The Federal Rules of Civil Procedure have codified what had been the common law of procedure;[9] the common law relating to landlord and tenant has been replaced by statute in most states, and the recent Uniform Residential Landlord and Tenant Act seeks to replace the disparate state statutes themselves.

Oddly, this significant measure of codification has occurred without the controversy that accompanied earlier codification efforts, and with little discussion of the wisdom of electing codification over common law.[10] It is time to take stock of the law that has been codified.

This Article provides a framework for analyzing the implications of the shift from common law to code for both the application and the development of the law. The Article finds that the codes have not unduly limited judicial discretion or frozen growth of the law, as had been feared by nineteenth-century opponents. But the Article goes on to show how

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not adopted the Uniform Code all have their own codes related to these matters. The Uniform Trusts Act has codified much of the common law concerning trusts. The Model Penal Code is now vying to replace the various criminal codes that virtually all states have adopted in place of the common law.

8. GRAHAM C. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE, at xxi (2d ed. 1987).

9. Although the Federal Rules of Civil Procedure significantly altered the procedural code immediately preceding it, the relevant point is that the Federal Rules of Civil Procedure occupy law that earlier was entirely uncodified common law. For a discussion regarding the distinct issues of codification and law reform, see *infra* part I.C.

10. The paucity of attention paid to codification is probably part of the federal bias among the community of academicians, for it is mostly state law that has been codified. But the tendency to give short shrift to state law is short-sighted, for state law is immensely significant. As important as federal law is, it remains true that federal law is "generally interstitial in nature," working within and building on the legal relationships created by state law. PAUL M. BATOR ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 533 (3d ed. 1988); *see also* Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489 (1954). Even where federal courts give life to federal statutes by means of federal common law, they often turn to state law for guidance and frequently incorporate state law. *See, e.g.*, United States v. Kimbell Foods, Inc., 440 U.S. 715, 739-40 (1979). Not only is state law generally the ground upon which federal law is built and operates, but Congress frequently incorporates state law concepts into the structure of the federal law. *See, e.g.*, Federal Tort Claims Act, 28 U.S.C. § 2680(a) (1988) (incorporating tort concept of "due care"); 28 U.S.C. § 1346 (1988) (referring to "express or implied contract[s]" and "negligent or wrongful act or omission"). Indeed, state law concepts are present even in the federal law that takes as its task the remaking of the baseline common law rules. *See, e.g.*, Employers' Liability Act, 45 U.S.C. § 51 (1988) (abolishing fellow servant rule and making railroads liable for the "negligence of . . . officers, agents, or employees of [the] carrier"). And finally, as a practical matter, it is state law that touches on citizens' lives most frequently and, arguably, most profoundly, shaping their relationships with strangers (contract and tort), family (intestacy and family law), and the state (criminal law).

codes have constrained legal development in ways unanticipated by codification opponents and unnoticed by recent commentators.

Part I of this Article carefully defines what is meant by the term "codification." Referring to both French and German codes, Part I identifies four models of codification found in the legal literature and clarifies the specific character of recent American codes.

Part II definitively establishes the importance of investigating the consequences of codification as it provides a firm response to scholars' claims that American codes have had little or no practical effect on the law. These scholars' conclusions have rested on the observation that practitioners and courts have continued to rely on pre-code and post-code caselaw. Part II demonstrates the fallacy of their reasoning. The Article reports the results of an extensive empirical study undertaken by the author that examines not only to what extent, but *how*, American courts have utilized legal materials external to the code when ascertaining the law. The study reveals eight interpretive approaches courts have used when consulting extra-code materials, which span the range of having no impact on the primacy of a code's text to significantly imperilling the centrality of the code. Part II shows that, in the end, it is the codes—not pre-code or post-code caselaw—that have been the chief sources of current law and the primary soil for the law's subsequent growth. The study also sheds light on the nature of post-code American legal reasoning.

Having established the codes' extensive impact on legal practice in Part II, Part III advances a framework for analyzing the jurisprudential effects of codification. By scrutinizing select drafting characteristics of the codes,[11] and the consequent complexion of post-codification legal argument, the Article reveals why the fears of nineteenth-century opponents—that codification would strip judges of needed discretion and freeze the law—have not materialized.

But Part III's findings do not mean that codified law retains the same possibilities for growth that characterized the common law. Part IV isolates three code characteristics that have significantly shaped the development of the law in ways unanticipated by nineteenth-century opponents and unnoticed by recent commentators. The first characteristic is the codification's "scope," the field of law covered by the code. The code's scope shapes people's views of what constitutes a "discrete" doctrinal area in which rule-consistency is expected; designates what lies outside the legal field and, as a consequence, what factors are legally

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11. Examined are (1) whether the code uses rules or standards; (2) whether the code's rules are carefully tailored to specific factual contexts or are transubstantive; (3) rules of construction concerning the code's relationship to pre-code law; (4) various code provisions that permit equitable adjustments; and (5) provisions that forthrightly invite the courts and legislatures to help further develop the codified law.

"irrelevant"; and contributes to bureaucratization of the law, under which hyperspecialists neglect to challenge aspects of the legal system that lie "outside" their specialty but that are determinative of the doctrines in their respective fields of expertise. The second code characteristic influencing post-code legal growth is the particular organizational scheme adopted by the code, under which certain policy concerns at work in the doctrinal field are emphasized and others hidden. The third code characteristic is the fundamental spirit to the codified doctrinal field—which is to say, the nonaxiomatic approach to the field's doctrine that embodies one set of controversial yet unspoken assumptions concerning law, people, and society—that was adopted by the code's drafters. Part IV demonstrates that the direction in which post-codification law has grown was largely predestined by the chosen spirit, and specifically examines the animating spirits incorporated in Article 2 of the Uniform Commercial Code, the Federal Rules of Evidence, and the Model Penal Code. Further, Part IV argues that the spirits behind each of these codes advance an ethic of atomism at the expense of community solidarity, and points to evidence that the chosen spirits indeed have socialized people. It is at the levels of scope, scheme, and spirit that the codes have had their greatest influence on shaping the law's subsequent development and on molding the way both legalists[12] and laypersons think.

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12. By legalists, I mean to include all members of the law community: practitioners, judges, legislators, academics, and law students.

## I. A TAXONOMY OF CODIFICATIONS

### *A. The Four Models of Codification*

Codification refers to the legislative pronouncement of previously fluid judge-made law in an organized and authoritative form.[13] Four jurisprudential models of codification can be identified in the scholarly literature. These will be denominated as the Fully Comprehensive, Field Comprehensive, Perpetual Index, and Meta-Scheme models.

#### 1. FULLY COMPREHENSIVE

The Fully Comprehensive model of codification presupposes that the "code, doctrinally, constitutes the whole body of private law."[14] An example is the Louisiana Civil Code; all pre-Code law was explicitly repealed in Louisiana by Acts 40 and 80 of 1828[15] and replaced by the Civil Code. This is the model most closely resembling the French and German approaches to codification.[16] Although several Fully Comprehensive attempts were undertaken in the United States at the end of the nineteenth century,[17] none of the American Codes adopted in the last seventy-five years has claimed to displace all prior private law.

Nevertheless, it is useful to consider the hermeneutic approaches associated with the Fully Comprehensive model, for these approaches help to understand the styles of code interpretation found under the other models of codification. Under what historically was the first approach to interpreting Fully Comprehensive Codes, the judge was prohibited from interpreting and, instead, was intended merely to mechanically apply clear

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13. Much scholarly literature referenced later in this Article has sought to clarify the differences between codes and statutes. It is variously claimed that "true" codes wholly displace all prior private law; wholly displace all law within their purview; constitute the sole source relied upon for meeting future unanticipated fact patterns; or "remain[] at all times [their] own best evidence of what [they] mean[]: cases decided under [codes] may be interesting, persuasive, cogent, but each new case must be referred for decision to the undefiled code text." Grant Gilmore, *Legal Realism: Its Cause and Cure*, 70 YALE L.J. 1037, 1043 (1961). Part I and Part III examine and critique these alleged Code prerequisites. While this Article elects to use a broad definition of "codification," the essay's findings are independent from the semantic issue of whether there exists a hermetic distinction between codes and statutes and whether the pieces of legislation discussed in this Article are labelled statutes or codes.

14. Shelp v. National Sur. Corp., 333 F.2d 431, 435 (5th Cir. 1964).

15. *Id.* at 437.

16. *Cf.* SCHLESINGER ET AL., *supra* note 6, at 287 n.44.

17. Namely, in the Dakota Territory, California, Idaho, Montana, and Georgia. Bodenheimer, *supra* note 5, at 16.

rules.[18] The impossibility of application without interpretation was soon recognized,[19] and there arose several sophisticated schools of jurisprudence that described, delimited, and legitimated the more active role that the judges inevitably had to play. Thus contemporary European legal commentators acknowledge the inadequacy of the text alone in generating legal results—variously arguing that code provisions must be supplemented by analogy from other code provisions;[20] by analogy from the "spirit of the whole law considered as one system";[21] by balancing the competing interests implicit in a given code provision and applying those policies to the situation at hand;[22] and by utilizing straight-forward

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18. The prohibition against judicial interpretation of Codes has a long history, dating back to Justinian. *See* BARRY NICHOLAS, AN INTRODUCTION TO ROMAN LAW 35 (1962). The impetus of stripping discretion from judges also can be seen in the Prussian *Landrecht* of 1794, which contained in excess of 16,000 "detailed provisions setting out precise rules to govern specific 'fact situations.'" JOHN H. MERRYMAN, THE CIVIL LAW TRADITION 29 (2d ed. 1985). Under the Prussian Code, in fact, judges were forbidden to interpret the Code, subject to severe punishment. Donald, *supra* note 4, at 162. Judges in France were similarly prohibited from interpreting the Code; established along with the Napoleonic Code was a governmental organ called the Tribunal of Cassation. This body, as part of the legislative branch, was empowered to strike down decisions that exceeded the legislative mandate. MERRYMAN, *supra*, at 41.

19. NORBERT HORN ET AL., GERMAN PRIVATE AND COMMERCIAL LAW: AN INTRODUCTION 12 (Tony Weir trans., 1982); MERRYMAN, *supra* note 18, at 41.

20. The German system of jurisprudence known as *Begriffsbildung* acknowledged that judges had to actively interpret the code's text. Adherents of this school therefore articulated a detailed methodology for analogical reasoning, which involved conceptualizing the rules found in a code provision and then deducing new rules from that concept. *See* PHILIPP HECK, BEGRIFFSBILDUNG UND INTERESSENJURISPRUDENZ 2-4 (1932), *reprinted and translated in* ARTHUR T. VON MEHREN & JAMES R. GORDLEY, THE CIVIL LAW SYSTEM 92 (2d ed. 1977).

21. HECK, *supra* note 20, at 3. This type of reasoning, also part of *Begriffsbildung*, was known as *Rechtsanalogie*.

22. This was the approach to code interpretation proffered by the *Interessenjurisprudenz* school. This approach, which strongly foreshadows American Legal Realism, instructed the judge to avoid treating law as a system of logic that is autonomous from the social context, and bid the judge to inquire directly into the empirical factual situation to ensure that the code's intent would be realized by application of the provision in question. Significantly, this methodology was always applicable; these theorists did not believe there to be instances where the judge need not engage in interpretation. In the words of one of its chief theorists:

> What the legislator intends is the protection of interests . . . . At the same time, however, he realizes that he is unable to capture the variety of life situations and to regulate them so completely that logical subsumption furnishes the correct delimitation in each individual case. *The legislator can put into effect his intentions and satisfy the demands of practical life only if the judge is more than a legal automaton functioning according to the laws of logical mechanics.* What our law and our life need is a judge who stands by the legislator's side as an intelligent helpmate, who does not merely consider

consequentialist analysis.[23] Even so, the focal point of these multifold interpretive techniques remains the text of the code: "The important thing is the elaborate effort to ascertain the genuine significance of the text,"[24] which is accomplished by "stating the law as a matter either of interpreting legislative texts or of reasoning from the web of principle which is seen as underlying those texts."[25]

### 2. FIELD COMPREHENSIVE

The Field Comprehensive model of codification asserts that the code need not digest the entirety of the private law. The code, however, must be comprehensive within its doctrinal field (for example, contracts or civil procedure), such that the code is to be the exclusive source of law.[26] Advocates of the Field Comprehensive model acknowledge that the

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> the words and the commands of the law but who enters into the intentions of the legislator . . . . Thus the primacy of logic is dislodged by the primacy of factual research and evaluation of facts.

HECK, *supra* note 20, at 3 (emphasis added).

Hans Kelsen astutely observed that *Interessenjurisprudenz*'s attempt to explain judges' reasoning processes by the analogy of interest-balancing merely restates the question since *Interessenjurisprudenz* failed to "supply the objective measure or standard for comparing conflicting interests with each other and does not make it possible to solve, on this basis, the conflict [between interests]." HANS KELSEN, THE PURE THEORY OF LAW 352 (1967).

23. This is the approach articulated by members of the German school of *Freie Rechtsfindung* ("free law") and by the French theorist Francois Geny. Geny distinguished between established legal rules ("formal law") and law that had not yet been finalized ("free law"), and advocated that when confronted with "free law" the judge should forthrightly analyze the social effects of applying different possible rules, taking account of economic, sociological, and psychological considerations in coming to a decision. FRANCOIS GENY, THE SCIENCE OF LEGAL METHOD (Louisiana State Law Institute trans., 1963) (1954). To the extent possible, the text of the Code still was to be the source/inspiration behind the different possible rules. *See* Herman Kantorowicz, *Legal Science—A Summary of its Methodology*, 28 COLUM. L. REV. 679 (1928).

24. Mitchell Franklin, *The Historic Function of the American Law Institute: Restatement as Transition to Codification*, 47 HARV. L. REV. 1367, 1377 (1934).

25. Barry Nicholas, *Introduction to the French Law of Contract*, *in* CONTRACT LAW TODAY: ANGLO-FRENCH COMPARISONS 10 (Donald Harris & Denis Tallon eds., 1989).

26. *See, e.g.*, Gilmore, *supra* note 13, at 1043; John E. Murray, Jr., *The Article 2 Prism: The Underlying Philosophy of Article 2 of the Uniform Commercial Code*, 21 WASHBURN L.J. 1, 1 (1981) ("The Code is not a traditional, authentic code [because a] genuine code totally displaces any pre-existing law."); L. Scarman, *Codification and Judge-Made Law: A Problem of Coexistence*, 42 IND. L.J. 355, 358-60 (1967) ("[A] Code must be . . . the comprehensive statement of the whole law within that field" of law, such that it "must be at the moment of [its] enactment the exclusive source of law within its field.").

codification will not have spoken to all eventualities within its scope, so they employ lacunae-filling methodologies akin to those advanced by proponents of the Fully Comprehensive model.[27] Interestingly, none of the recent American codifications has even aspired to the level of the Field Comprehensive model.

Some advocates of the Fully Comprehensive model attack the very notion of a noncomprehensive codification, asserting that a noncomprehensive codification is an oxymoron. Only a complete statement of the private law, argue these theorists, can constitute the grand codification that can be the new authoritative source for resolving all legal questions. These Fully Comprehensive theorists assert that the Field Comprehensive advocates aspire to legislation falling short of a codification.[28]

This argument posed by the Fully Comprehensive advocates founders upon closer examination. First, the "Fully Comprehensive" codes themselves are comprehensive codifications of only a subset of the entirety of law—so-called "private" law. To the extent that the distinction between private and public law is indistinct and arbitrary,[29] the

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27. *See* Scarman, *supra* note 26.

28. The primary advocates of the first school of codification are contemporary Europeans and jurisprudes of the last century. *See* SHELDON AMOS, THE ENGLISH CODE (London, Strahan & Co. 1873) (arguing against codifying parts of the law and advocating only a wholly comprehensive codification); Aubrey L. Diamond, *Codification of the Law of Contract*, 31 MOD. L. REV. 361, 379 (1968) (explaining French legalist Denis Tallon's assertion that the U.C.C. "isn't really a Code: it's a collection of practical solutions" as referring to the fact that the U.C.C. "does not purport to contain all the law there is"); *see also* JOHN AUSTIN, LECTURES ON JURISPRUDENCE (London, John Murray 1885); Bentham, *supra* note 2.

29. Private law is understood in contrast to "public" law, which is viewed as the natural province of the legislature. The distinction between private and public law, however, is culturally contingent. For example, neither Islamic law nor Jewish law recognizes such a distinction. *See* Noel J. Coulson, *The State and the Individual in Islamic Law*, 6 INT'L & COMP. L.Q. 49, 50 (1957) ("Islamic religious law sees as its essential function the portrayal of an ideal relationship of man to his Creator: the regulation of all human relationships, those of man with his neighbor or with the State is subsidiary to, and designed to serve, this one ultimate purpose."); *Deuteronomy* 17:14-20 (Jewish law); MAIMONIDES, MISHNA TORAH: LAW OF KINGS, LAWS 1-8 (Jewish law).

Moreover, within contemporary Western jurisprudence itself the distinction between public and private law has come under attack as being both arbitrary and incoherent. Public law classically has been understood as the vehicle by which the state intervenes in the relations of individuals, with the intervention being justified by one or more of a variety of policy goals whose legitimacy rests on the proper functioning of the democratic system. The private law was understood as the pre-political and distributionally neutral rules that govern the relationships of individuals absent state interference via public law. *See, e.g.*, Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225 n.47 (1992) (arguing that "tort, property and criminal law" are

difference between the Fully Comprehensive and Field Comprehensive codes is one of degree rather than kind.

Second, ignoring the problematic private/public distinction, *no* code would pass muster as a codification under the Fully Comprehensive model's strict test for yet another reason: subsequent corrective legislation has supplemented all codes, to the effect that the codes no longer can be spoken of as the sole source of law.[30] At best, then, the Fully Comprehensive model becomes a mere Platonic ideal, only the shadow of which can be found in actual legal systems.

Third, it must be asked why the Fully Comprehensive model is the paradigm at all. Rather than argue from tautology—that "codification" definitionally means reducing the entirety of the law to code—the better approach is to consider what role codification is to play and then to ask what form the code must take to accomplish that task.

### 3. PERPETUAL INDEX

Proponents of the Perpetual Index model expect even less comprehensiveness than do champions of the Field Comprehensive model, asserting that, as a practical matter, a codification cannot hope to be a comprehensive and final statement even with respect to its particular field. The codes are to be merely "a perpetual index to the known law, gradually refining, enlarging and qualifying its doctrines, and, at the same time, bringing them together in a concise and positive form for public

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"neutral"). The common law was the source and location of the private law.

Many of today's legal scholars, however, argue against the classical notion of the common law's neutrality. Instead, they say, with respect to any particular legal question in private law, there are a variety of possible legal rules that would be consistent with this country's market economy and moral sensibilities. *See, e.g.*, Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349 (1982); Cass R. Sunstein, *Neutrality in Constitutional Law*, 92 COLUM. L. REV. 1 (1992). To the extent that an active *choice* benefitting some at others' expense lurks behind most if not all "private" law, the distinction between public and private law becomes illusory, and the theoretical distinction between Fully Comprehensive and Field Comprehensive codifications disappears.

30. For example, the great German Civil Code known as the *Burgerliches Gesetzbuch* ("B.G.B.") coexists with three other Codes: the Commercial, Penal and Procedural Codes. A second aspect of the B.G.B.'s noncomprehensiveness is that parts of its provisions have been overridden by later legislation. For example, article 823 of the B.G.B., which articulated a fault approach to torts, was replaced, in part, by the German Motor Vehicle Act of 1909, which imposes a rule of strict liability in motor vehicle accidents. A similar lack of comprehensiveness is found in the French *Code Civil*. *See* Donald, *supra* note 4, at 166-67.

use."[31] The code is a clarifying aid rather than a final statement, and a vehicle for facilitating the law's continued growth. Codification is still useful, according to adherents of the Perpetual Index paradigm, because it constrains the exercise of judicial lawmaking and facilitates access to the law without stifling the law's development.

Advocates of the Fully Comprehensive and Field Comprehensive models regularly assert that a true code must entirely preempt the field it codifies, rendering pre-code and post-code caselaw irrelevant. The Perpetual Index model, they argue, constitutes an act of legislation less than a code, because a code must "carry within it the answers to all possible questions: thus when a court comes to a gap or an unforeseen situation, its duty is to find, by extrapolation and analogy, a solution consistent with the policy of the codifying law."[32]

This prerequisite does not withstand scrutiny. The European jurisprudence schools of *Interessenjurisprudenz*[33] and *Freie Rechtsfindung*[34] conclusively demonstrate that there are factors beyond the text of the code itself that inevitably are involved in code interpretation; "extrapolation" and "analogy" are not self-executing. The question then becomes *what* extra-code factors properly can be involved in interpreting the code. Historically, political rather than jurisprudential considerations have fueled efforts to exclude pre-code materials from guiding a code's interpretation.[35]

Moreover, the ideal of a complete break from pre-code law in all likelihood is unrealizable. Rather than fomenting immediate revolution, it is likely that new legal doctrines will be understood in the light of past legal practice—similar rules will be similarly interpreted and different

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31. Joseph Story et al., *Story's Report*, *in* CODIFICATION OF THE COMMON LAW 25, 46 (New York, Martin Brown 1882).

32. Gilmore, *supra* note 13, at 1043.

33. *See* discussion *supra* note 22.

34. *See* discussion *supra* note 23.

35. The historical contexts out of which the codification movements in France and Germany grew illuminate why code interpretation in those two countries was undertaken without recourse to prior legal materials. The legal materials associated with the *ancien regime* (France) or reflecting non-Germanic *Volksgeist* were hostile to the larger contemporary ideological movements. *See* MERRYMAN, *supra* note 18.

In post-revolutionary France, the codifiers hoped to make a complete break from the pre-revolutionary regime by implementing a completely new legal system that would reflect the rationalist ideals of post-revolutionary enlightenment France. It was also hoped that the code would help unify the country by bringing legal uniformity that would facilitate economic and social relations between the different parts of France. Similarly, the German B.G.B. was a manifestation of a drive to economically and socially unite the newly politically united Germany.

rules will be interpreted as solutions to past problems.[36] The requirement that a code "exclud[e] all reference . . . to any source of law other than itself"[37] is thus—at best—an unattainable aspiration. The real question becomes whether post-code legalists' ties to past jurisprudence are forthrightly acknowledged.

Some legal theorists have acknowledged the inevitable reliance post-code legalists have on pre-code law, and merely argue that "the pre-code common law is no longer available as an *authoritative* source."[38] Under this view, recent American Perpetual Index codifications are not disqualified, because pre-code law for the most part is used as a tool to elucidate the code, not as a co-equal source of law.[39]

Another prerequisite advanced by some Fully Comprehensive and Field Comprehensive model advocates is that caselaw cannot have precedential value:

> When a "statute," having been in force for a time, has been interpreted in a series of judicial opinions, those opinions themselves become part of the statutory complex: the meaning of the statute must now be sought not merely in the statutory text but in the statute *plus* the cases that have been decided under it. A 'code' on the other hand, remains at all times its own best evidence of what it means: cases decided under it may be interesting, persuasive, [or] cogent, but each new case must be referred for decision to the undefiled code text.[40]

Interpretation without considering similar post-code cases, however, in all likelihood is counter to real practice. Even in France, where constitutional theory eschews precedent and "still declares that judicial decisions cannot be a source of law,"[41] scholars have concluded that

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36. *Cf.* 1 JOHN H. WIGMORE, EVIDENCE § 8c, at 630-31 (Peter Tillers rev., 1983) ("You cannot by fiat legislate away the brain-coils of one hundred thousand lawyers and judges, or the traditions embedded in a hundred thousand recorded decisions and statutes . . . . [One must wait] until all mature practitioners and judges now alive ha[ve] passed into the grave. And in the mean time, since trials must go on, a new generation will have been bred into the same system.").

37. H.R. Hahlo, *Here Lies the Common Law: Rest in Peace*, 30 MOD. L. REV. 241, 243 (1967).

38. Gilmore, *supra* note 13, at 1043 (emphasis added).

39. *See* discussion *infra* part II (empirical study of the codes).

40. Gilmore, *supra* note 13, at 1043 (emphasis in original).

41. Nicholas, *supra* note 25, at 10. The code's relationship to pre-code and post-code judicial decisions will be more fully examined *infra* part III.B.1.

judicial decisions influence subsequent interpretation.[42] Reference to post-code caselaw is inevitable in the legal culture found in the United States, which so heavily prizes even-handed application of the law and limitations on judicial discretion.

In sum, interpretation in light of pre-code and post-code legal materials does not, in and of itself, render the interpreted text something other than a code. To assert otherwise would be to claim that no self-styled codes in fact have been codes.

The Perpetual Index model can accommodate several hermeneutics.[43] One is that the code is treated as an organized restatement of the common law. The code consequently is not to be construed strictly in derogation of the common law. Rather, it is to be understood and expanded in conscious reference to the antecedent common law and by means of the repertoire of common law interpretive techniques, unless the code explicitly indicates that it is breaking with the common law past.[44]

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42. Nicholas, *supra* note 25, at 10. Recently, French legalists have begun to refer explicitly to court opinions. Barry Nicholas, *Introduction to the French Law of Contract*, *in* CONTRACT LAW TODAY: ANGLO-FRENCH COMPARISONS 10 (Donald Harris & Denis Tallon eds., 1989).

43. All three approaches to be described were noted by Story et. al., *supra* note 31, at 40-44. The richness of the different approaches to codification within the Perpetual Index stands in stark contrast to the monolithic portrait painted by some proponents of the Fully Comprehensive model. *See* SCHLESINGER ET AL., *supra* note 6, at 293 ("In the eyes of the [lawyer brought up in the common law tradition] a code is supplemental to the unwritten law, and in construing its provisions and filling its gaps, resort must be had to the common law.").

44. An example of this type of approach to interpreting a code can be found in section 1-103 of the Uniform Commercial Code. *See infra* text accompanying notes 231-38. The American experience with this style of code interpretation undercuts the hypotheses of some Field Comprehensive advocates that "[a] code must be at the moment of enactment the exclusive source of law within its field, simply because, unless it purports to exclude all other sources, it is in danger of failing to develop or reform." Scarman, *supra* note 26, at 359.

Interpreting the code directly in light of the common law precedents is similar to the approach formulated by John Norton Pomeroy in his influential essays contained in *The True Method of Interpreting the Civil Code*, which had a significant impact on California judges' approach to interpreting the California Civil Code. *See* J.N. Pomeroy, *The True Method of Interpreting the Civil Code*, 3 WEST COAST REP. 585, 657, 691, 717 (1884), 4 WEST COAST REP. 1, 49, 109, 145, 146 (1884) (arguing that "the courts must go outside of the Code, and must find [the detailed rules] in the pre-existing and still existing common law or equity untouched or unaltered by the Code . . . . [the] provisions [of the Code] are to be regarded as simply declaratory of the previous common law and equitable doctrines and rules, except where the intent to depart from those doctrines and rules clearly appears from the unequivocal language of the text."); *see also* Arvo Van Alstyne, *The California Civil Code*, *in* CAL. CIV. CODE ANN. 31 (West 1954).

A second interpretive approach under the Perpetual Index model views the code as displacing the pre-code common law antecedents to provide the legal soil of future growth. The provisions of the code thus are to provide the rule "not only in cases directly within its terms, but indirectly, and by analogy"[45]; the common law precedents are not relevant.[46]

A third approach construes the code on its own terms as a self-contained super-statute—without reference to the antecedent common law—with respect to all scenarios for which the code has "provided." Under this approach, though, the rule of decision is to be furnished by the common law with respect to matters not covered by the code.[47]

As will be seen, all recent American codifications belong to the Perpetual Index model. Moreover, the codes have variously been interpreted using each of the above hermeneutics.

### 4. META-SCHEME

The Meta-Scheme model of codification resembles the other three models, but emphasizes a different determinative characteristic. This school asserts that the primary significance of a code is that it organizes the legal materials, making "a philosophically arranged *corpus juris* possible."[48] As stated by Oliver Wendell Holmes, a "well-arranged body of the law would not only train the mind of the student to a sound legal habit of thought, but would remove obstacles from his path which he now only overcomes after years of experience and reflection."[49]

Although Holmes was speaking specifically about a Fully Comprehensive codification, this insight is applicable to the other three models of codification as well. The scheme by which the code organizes

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45. Story et al., *supra* note 31, at 44. *See generally* Comment, *The Uniform Commercial Code as a Premise for Judicial Reasoning*, 65 COLUM. L. REV. 880 (1965).

46. This approach is most pronounced where the code has self-consciously rejected the prior common law and replaced it with a new rule. *See, e.g.*, Zenith Radio Corp. v. Matsushita Elec. Indus. Corp., 505 F. Supp. 1125, 1142 (E.D. Pa. 1980); *see* discussion *infra* notes 190-91 and accompanying text.

47. *See, e.g.*, State v. Martin, 573 A.2d 1359, 1373 (N.J. 1990) (looking to cases preceding New Jersey's adoption of the Model Penal Code's felony murder rule to define the term "probable consequence," a term that is used in the Model Penal Code but not defined in the particular context of felony murder. The term's definition is found in a different Model Penal Code provision.).

48. Oliver Wendell Holmes, *Codes, and the Arrangement of the Law*, 5 AM. L. REV. 1, 2 (1870), *reprinted in* 15 HARV. L. REV. 725, 726 (1931).

49. *Id.* at 724.

the law reflects a choice among several options. As will be seen, it exerts a monumental force on the direction of future legal growth.[50]

### *B. Confusion Arising from the Failure to Disaggregate the Different Forms of Codification*

Failure to recognize the different codification models has led some commentators astray. For example, while examining the California Civil Code, Professor Izhak Englard asserts that "[t]he reality of the Code's failure as a Codification is accepted by all major contemporary writers."[51] In fact, analysis of the sources upon which he relies for this broad conclusion reveals a different picture: rather than pronouncing complete failure, Englard's sources were critiquing a particular aspect of the code that was relevant to only one specific model of codification.

Englard's sources are Donald and Fisch.[52] Donald, like Englard, merely cites to Fisch for the broad conclusion that codification failed: "The complete Codes [of California, Montana, North Dakota, and South Dakota] . . . have not lasted in their original forms, ultimately being subsumed within the Revised Statute Codes in California and the Dakotas. Nor were they successful: *see* Fisch . . . ."[53] Fisch, however, does not speak so generally. The "failure" that Fisch observes is the failure of the Dakota Civil Code to achieve the objective of the Meta-Scheme model: "It seems to me that the most important respect in which the Code has failed, however, is in what Holmes thought to be the primary function of codification, namely, to lay down a philosophically arranged *corpus juris*."[54] In fact, just a paragraph before this, Fisch explicitly states that the nineteenth-century program of codification *cannot* be characterized as a failure: "In those jurisdictions which adopted the Code . . . it cannot be said that the Code failed, for in those jurisdictions at least the substance remains in effect and has constantly been used."[55] It is only by treating the Meta-Scheme model as the sole model of codification that Donald and Englard were able to misread Fisch's argument. Englard's failure to disaggregate his understanding of "codification" should put the reader on notice. "Codification," as employed by scholars, is a

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50. *See infra* part IV.

51. Izhak Englard, Li v. Yellow Cab Co.—*A Belated and Inglorious Centennial of the California Civil Code*, 65 CAL. L. REV. 4, 18 n.83 (1977).

52. Donald, *supra* note 4; William B. Fisch, *The Dakota Civil Code: More Notes for an Uncelebrated Centennial*, 45 N.D. L. REV. 9 (1968).

53. Donald, *supra* note 4, at 167-68 n.59.

54. Fisch, *supra* note 52, at 54.

55. *Id.* at 54.

polymorphous term. As such, care must be taken to identify exactly what each scholar intended when he or she employed the term.

### *C. Codification and the Reform of Law*

While law reform has accompanied all codifications, the extent of the reform has varied.[56] Some codes attempted to wholly displace outdated common law,[57] whereas others retained the bulk of the common law framework.[58] It is true that law reform is a likely concomitant of codification, since significant attention to the law accompanies all efforts to codify. Nonetheless, codification and reform are logically distinct phenomena. Consequently, law reform, as such, will not receive further attention.

## II. AN EMPIRICAL STUDY OF THE LIFE OF THE CODES

Before analyzing the textual characteristics of recent American codifications and their impact on the application and development of the law, it must be shown that the American codes are susceptible to such analysis. It is possible, after all, that the text of the codes is largely irrelevant, and that the operative law to which practitioners and judges instead turn is the pre-code and post-code caselaw.

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56. *See, e.g.*, PAUL F. ROTHSTEIN, UNDERSTANDING THE NEW FEDERAL RULES OF EVIDENCE 10-25 (Supp. 1975) (examining the substantive changes of the common law rules of evidence that are found in the Federal Rules of Evidence, including Rule 401's more liberal allowance into admission as evidence anything having "*any tendency*" to make a consequential fact more or less probable and Rule 701's substitution of "helpful" for the "collective facts" rule with respect to well-founded lay opinion); *see also* 8A UNIF. LAWS ANNOTATED 342-49 (1968) (noting reform aspects of the Uniform Statutory Rule Against Perpetuities); Arthur L. Corbin, *The Uniform Commercial Code—Sales; Should it Be Enacted?*, 59 YALE L.J. 821 (1950) (noting reform aspects of Article 2 of the U.C.C.); Van Alstyne, *supra* note 44, at 37 (noting reform aspects of the California Civil Code).

57. *See, e.g.*, UNIF. RESIDENTIAL LANDLORD AND TENANT ACT § 1.102 cmt. (1990) ("Existing landlord-tenant law in the United States . . . is a product of English common law developed within an agricultural society . . . . These doctrines are inappropriate to modern urban conditions.").

58. For example, Article 2 of the Uniform Commercial Code maintained the late nineteenth- and twentieth-century Agreement approach to contract, *see* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780-1860 (1977), while wholly eliminating the significance of title. *See* Samuel Williston, *The Law of Sales in the Proposed Uniform Commercial Code*, 63 HARV. L. REV. 561, 566-69 (1950); Corbin, *supra* note 56 (responding to Williston's criticism concerning the significance of elimination of title).

Some scholars, indeed, have made such claims. Examining the California Civil Code, one commentator has claimed that "[i]n reality, the courts to a large extent simply ignored the Civil Code . . . . Indeed, no instance can be found where a common law jurisdiction successfully turned into a mixed jurisdiction simply by adopting some measure of civil law."[59] Another scholar wrote that "the Civil Code appears not to have greatly influenced the decisions."[60] And after studying New York's Field Code, Englard claimed to have documented "the code's own loss of identity," which he attributed to the code's having "necessarily bec[o]me immersed in the sea of common law."[61]

This study does not directly challenge the aforementioned commentators' conclusions regarding the codes they studied. The study does show, though, that these scholars' findings do not extend to all recent codifications. The study definitively demonstrates the significant role that the Uniform Commercial Code and the Federal Rules of Evidence have played in the application of American law.[62]

The first sub-part poses the question of the codes' significance in elaborating the law within an appropriate jurisprudential context. The second sub-part outlines the study's methodology and limitations. The third sub-part details the study's findings. The fourth sub-part provides some preliminary general conclusions.

### *A. Jurisprudential Considerations*

The universe of authoritative legal texts can be usefully divided into two categories: "interpreted" and "interpreting." "Interpreted" texts are the well-springs of legal rights and obligations, and encompass constitutions, statutes, and codes. "Interpreting" texts are the elaborations of the "interpreted" texts, and include judicial opinions and regulations.

The relationship between interpreted and interpreting texts is not constant. In many instances—as with the Internal Revenue Code—the interpreted text is the significant determinant of the resulting legal obligations. Let this be labelled the "Tax" paradigm. In other instances—as with the Sherman Antitrust Act[63] and the United States Constitution—the relationship between the interpreted and interpreting

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59. Englard, *supra* note 51, at 18-19.

60. Joseph L. Lewinsohn, *Mutual Assent in Contract Under the Civil Code of California*, 2 CALIF. L. REV. 345, 366 (1914), *quoted in* Englard, *supra* note 51, at 19.

61. Englard, *supra* note 51, at 15.

62. Parts III and IV provide further evidence regarding the significance of the recent American codifications.

63. 15 U.S.C. § 1 (1988).

texts is more complex: although the statute or Constitution provides the general contours of legal rights and obligations, the interpreting texts and institutions shape the bulk of such rights and obligations.[64] Let this relationship be identified as the "Constitutional" paradigm. The Tax and Constitutional paradigms form a continuum on which other interpreted texts—including the codes—can be situated.

The location of a code on the Tax-Constitutional continuum—that is, whether the code or the caselaw is the de facto source of the law—determines whether the code's aspirations of uniformity and predictability are realized, and influences whether the code's danger of arresting the law's subsequent development comes to pass. Locating where on the continuum the code is situated, however, is complicated. While it is true that courts regularly cite to pre-code and post-code cases in their opinions, this fact alone does not answer the question, for two reasons.

First, whether post-codification practitioners are able to answer most legal questions by recourse to the code alone is not fully ascertainable by looking at how courts have utilized pre-code and post-code law in their opinions.[65] This is so because the questions appearing in court opinions are not representative of the bulk of legal questions answered in daily legal practice. Instead, the questions addressed in court opinions tend to be disputed matters of law—what may be called the fuzzy edges of the clear law.[66] Determining whether the legal practitioners treat the code as the source of the law and the interpreting texts as the clarifying tools, or instead rely predominantly or exclusively on pre-code and post-code caselaw[67] therefore requires an empirical inquiry into practitioners' experiences. Although not constituting a large enough sample from which

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64. *See, e.g.*, Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 643 (1981) (noting that the Sherman Act does not "delineate the full meaning of the statute or its application in concrete situations" but that "the courts [are] to give shape to the statute's broad mandate"); Michael J. Perry, *The Constitution, the Courts, and the Question of Minimalism*, 88 NW. U. L. REV. 84, 133 (1993) (observing the need for "specification" of the general phrases found in the United States Constitution).

65. The study will provide indirect evidence of practitioners' reliance on extra-code legal materials since court opinions are generally responsive to the arguments proffered by counsel. Often court response to attorneys' reliance on such legal materials is obvious. *See, e.g.*, United States v. Hale, 978 F.2d 1016, 1020, 36 Fed. R. Evid. Serv. (Callaghan) 1034, 1036 (8th Cir. 1992) ("[appellant's] reliance on *Ohio v. Roberts* is misplaced") (citation omitted).

66. *See* Diamond, *supra* note 28, at 369. *See generally* H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958) (discussing unambiguous rules and their inevitable "penumbras" where the rule is uncertain).

67. Assessing the codes' impact on the practitioner is relevant because clarifying the law and achieving greater uniformity have been two of codification's chief justifications.

statistically reliable inferences can be drawn, interviews with many experienced trial attorneys in Massachusetts who litigated before adoption of the Federal Rules of Evidence and who continue to litigate in Massachusetts state courts (Massachusetts has not adopted the Federal Rules of Evidence and still relies on common law) have been undertaken by the author. Every attorney has expressed the opinion that the codification in question has greatly facilitated identification of the applicable legal rule.[68]

Second, with respect to analyzing the codes' treatment in the hands of the courts, establishing where the codes fall along the Tax-Constitutional continuum requires careful attention to *how* the pre-code and post-code materials are utilized. The rest of this sub-part examines this question, in order to gauge the codes' location on the continuum. The study identifies eight interpretive techniques that utilize extra-code legal materials, each of which is situated at a unique point on the Tax-Constitutional continuum. The first four are, generally speaking, methods of ascertaining the meaning latent in the text of the codes, and the other four are variant means of supplementing the rule in the code. Further, as will be demonstrated, the frequency with which these different techniques are utilized is a function of two variables: the code's drafting characteristics and its age.

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68. Foreign legal scholars' informal polling concerning the practical effects of foreign codes' on practitioners has yielded inconsistent results. Some studies have found that codes facilitated determining the law. *See* E.J. Cohn, *The German Attorney*, 9 INT'L & COMP. L.Q. 580, 586-87 (1960) ("There can be no doubt at all . . . that codification renders the task of the practicing lawyer very much easier than it is in an uncodified system . . . ."), *quoted in* Hahlo, *supra* note 37, at 248. Others have concluded that codification has been irrelevant, and yet another study has determined that codification has exacerbated difficulties in ascertaining the law. *See* Hahlo, *supra* note 37, at 251-53.

### *B. An Empirical Study of Courts' Use of Codes*

#### 1. METHODOLOGY

The study involves 200 randomly selected opinions of courts and attorneys general that involved interpretation of code provisions. Concurring or dissenting opinions were treated as separate opinions. Half the cases involved the Uniform Commercial Code and the other half concerned the Federal Rules of Evidence. To determine if judicial practice has varied over the life of the codes, half of the opinions studied were recent and half were issued in the codes' respective infancies. The Uniform Commercial Code cases were drawn from the *Uniform Commercial Code Reporting Service*[69] and cases interpreting the Federal Rules of Evidence came from the *Federal Rules of Evidence Service.*[70] This study did not take into account those cases found in the beginning volumes that merely cited to the U.C.C. or Federal Rules of Evidence for additional support with respect to transactions that were undertaken before the U.C.C. came into effect, or trials that were heard before the Federal Rules of Evidence took effect. As the code provisions were not dispositive in those cases, it is very possible that the opinions did not give the code careful attention.

To accurately gauge the extent to which caselaw was relied upon, the study counted the number of "issues" of code law that appeared in each legal opinion,[71] where each "issue" was a single proposition of law. Thus, one provision of a code could have been the source of several issues.[72] Similarly, the "number" of caselaw references is not the

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69. This study examined the first 25 cases applying the Uniform Commercial Code that were found in Volume 1, the first 25 cases found in Volume 2, the first 13 found in Volume 41, the first 12 found in Volume 42, the first 13 found in Volume 18 of the second series, and the first 12 found in Volume 19 of the second series.

70. This study examined the first 25 cases applying the Federal Rules of Evidence. found in Volumes 1 and 2 and 50 cases from Volume 36.

71. Merely counting the number of cases appearing in a decision would mask the significant difference between a decision that invoked two cases while interpreting one provision of the U.C.C. and a decision that looked to two cases while interpreting 50 provisions of the U.C.C.

72. For example, in Miltland Raleigh-Durham v. Myers, 807 F. Supp. 1025, 36 Fed. R. Evid. Serv. (Callaghan) 892 (S.D.N.Y. 1992), the court interpreted FED. R. EVID. 801(d)(2)(E), which allows statements of co-conspirators into evidence. The court relied on a case and the citation of a treatise for the proposition that evidence of a formal agreement among conspirators is not a prerequisite to triggering the rule. The court also cited to two other cases to support its assertion that a statement by an alleged co-conspirator "itself may be properly examined by the court in making the determination of admissibility under 801(d)(2)(E)." *Miltland Raleigh-Durham*, 807 F. Supp. at 1053.

number of cases appearing in the decision but is the number of times that caselaw was relied on to establish a legal proposition. Because a single case often was cited for numerous propositions of law, single cases frequently were counted more than once in determining the number of cases relied upon to interpret the code.[73] Finally, the study ignored caselaw regarding legal questions not concerning the code appearing in the judicial opinion, such as the standards of appellate review.[74] The data's findings are reported in Figures 6, 7, and 8 in Appendix 1.[75] The raw data can be found in Appendix 2.[76]

### 2. METHODOLOGICAL CHALLENGES ACCOMPANYING THE STUDY

Attempting to statistically identify interpretive techniques used by courts in analyzing codes is fraught with daunting challenges. The first involves the bias in case selection, the major factor determining the inferences that can be drawn from the study. The study looks only to *cases*—full-blown litigations that never settled. Cases clarifying the rules' ambiguity, however, do not represent the practitioner's every-day experience when he or she turns to the code to ascertain the law.

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The study treated these as two separate issues, although the same rule was the subject of inquiry. Similarly, caselaw brought to interpret more than one prong of a several-prong test appearing in a code rule was treated as caselaw elucidating more than one issue.

73. A good example that illustrates the necessity of this type of accounting is provided by Ladex Corp. v. Transportes Aereos Nacionales, S.A., 476 So. 2d 763, 42 U.C.C. Rep. Serv. (Callaghan) 133, 135-36 (Fla. Dist. Ct. App. 1985). Consider the following excerpt:

> A shipment contract is regarded as the normal contract where the seller is required to send the goods by carrier to the buyer but is not required to guarantee delivery at a particular location. Pestana, 367 So. 2d at 1099. A C.I.F. or C. & F. contract is a shipment contract. *See* U.C.C. § 2-320 [cmt.] 1 (1978). In the normal shipment contract, the title to the goods and the risk of loss passes to the buyer when the goods are properly delivered to the carrier for shipment to the buyer. U.C.C. § 2-320 [cmt.] 1 (1978); *Pestana*, 367 So. 2d at 1099.
>
> On the other hand, a destination contract is regarded as the variant type of contract in which the seller agrees to deliver the goods to the buyer at a particular destination and to bear the risk of loss until tender of delivery. U.C.C. § 2-563 [cmt.] 5 (1978); *Pestana*, 367 So. 2d at 1099.

*Ladex*, 476 So. 2d at 765 (citations to statutes omitted). Although only one case is referred to throughout this excerpt, it would be deceptive to characterize this as an instance in which only one case is referenced. The more accurate description is that there are four "issues," three of which are supported by extra-code legal materials.

74. *See, e.g.*, Rodi Boat Co. v. Provident Tradesmens Bank & Trust Co., 339 F.2d 259, 2 U.C.C. Rep. Serv. (Callaghan) 7, 9 (3d Cir. 1964).

75. *See infra* Appendix I.

76. *See infra* Appendix II.

Unrepresentativeness is exacerbated by the fact that the study probed those cases that were *reported* in specialized reporter publications, i.e., those cases deemed worthy of publication because of the issues' novelty.[77] To the extent these factors limit the inferences regarding practitioners' everyday experience in locating the law, however, they make the study a showcase for courts' utilization of pre-code and post-code caselaw when interpreting the codes.

The second challenge inherent in this type of study concerns the sample size necessary to yield statistically significant findings. Appearing in the 200 cases were 657 code issues. More than 1,000 caselaw citations were relied upon during the resolution of these issues, and clearly discernible patterns emerged. These indicators suggest that the sample was of a sufficient size to generate statistically reliable findings. Specific comments regarding the statistical significance of particular findings are provided as they are reported.

The third challenge concerns the subjectivity involved in the eight-fold grouping categorizing the different uses of caselaw. Clearly, the persuasiveness of the categories depends on whether other persons agree with the phenomena that the categories claim to describe. This is an ambiguity that attends all social science research. The study provides excerpts from the opinions that exemplify each of the categories.

The fourth challenge is at the level of applying the framework to the opinions. While the lines between the eight categories are sometimes blurry, the ambiguity in characterizing the caselaw usage tends to cluster around a finite part of the Tax-Constitutional continuum. Ambiguity as to whether a particular caselaw usage is more accurately characterized as falling in the seventh or eighth interpretive technique, for example, does not diminish the significance that the usage lies on the side of the continuum most threatening to the code's integrity. Challenges in characterization are considered as the eight extra-code hermeneutics are discussed. Most of the time, categorization of caselaw usage was straightforward.

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77. By examining cases appearing in the specialized U.C.C. and F.R.E. reporting services, the study ensured that the notable legal issue was either a commercial code or evidentiary question. The study assumes that these services are not systematically biased in the cases they choose to report.

### *C. The Findings: Courts' Uses of the Codes in Determining the Law*

#### 1. LOOKING SOLELY TO THE TEXT OF THE CODE

The paradigmatic approach to code interpretation is to look solely to the text of the code and not to cite any legal materials external to the code. Of the 657 code issues requiring resolution over the 200 cases, 268 (40.8%) of the issues were resolved without recourse to extra-code legal materials.[78] A more detailed summary is provided in Figure 1, below. As will be discussed soon, this underestimates the extent to which courts in effect relied solely on the text of the code. Under an adjusted approach, approximately 56.3% of the issues were resolved only by reference to the code.[79] Both the adjusted and unadjusted figures demonstrate that courts have relied purely on the text of the codes to a significant extent.

**Figure 1**

| | Number of issues | Issues resolved without consulting extra-code materials | Percent of total issues resolved without consulting extra-code materials |
|---|---|---|---|
| Early UCC cases | 148 | 91 | 61.5% |
| Late UCC cases | 190 | 67 | 35.3% |
| Total UCC cases | 338 | 158 | 46.7% |
| Early FRE cases | 126 | 55 | 43.7% |
| Late FRE cases | 193 | 55 | 28.5% |
| Total FRE cases | 319 | 110 | 34.5% |
| GRAND TOTAL | 657 | 268 | 40.8% |

78. There is a 1.9% standard deviation to this percentage. There is a confidence level of 80% ("80% confidence range") that the true percentage of issues that were resolved without recourse to extra-code materials falls within a 2.44% range of 40.8%. *See* JOHN E. FREUND & RONALD E. WALPOLE, MATHEMATICAL STATISTICS 418 (4th ed. 1987). Subsequent reportings of the statistical significance of observations will list the standard deviation and the 80% confidence range.

79. *See infra* note 94 and accompanying text.

Court reliance solely on the text of the code is an interpretive technique that becomes less frequent as the code ages. For example, resolution of U.C.C. issues by reference only to the code fell from 61.5%[80] to 35.3%[81] during the two time periods examined. As the code ages, however, courts increasingly use techniques functionally identical to relying purely on the code.[82] The above figure thus exaggerates the decline of the primacy of the codes' text.

### 2. EXTRA-CODE HERMENEUTICS: CODE INTERPRETATION INVOLVING CITATIONS TO LEGAL MATERIALS OUTSIDE THE CODE

The 389 remaining code issues were resolved by citing to extra-code materials: cases preceding the codes' enactment ("pre-code cases"), cases interpreting the code ("post-code cases"), and articles or treatises ("articles"). Seventeen of the issues were answered by invoking two different hermeneutic techniques. Thus, the 389 issues were resolved by means of 406 "acts" of interpretation. Each act involved one or more case citations. More specifically, 1033 citations to extra-code materials accompanied the 406 acts of interpretation.

The study broke the 406 acts of extra-code interpretation into eight interpretive techniques. A ninth category, denominated "noise," counted the number of extra-code interpretive acts not falling into any of the eight classes. There were a total of five instances of "noise," which accounted for sixteen extra-code citations. This is less than 0.1%[83] of the observed instances of interpretation and number of cited extra-code materials. Such a small figure indicates that the eight categories were nearly entirely exhaustive.

What follows is a description of each of the eight paradigms of extra-code interpretation, accompanied by a report of the study's findings. The categories will be enumerated from those that least undermine the primacy of the code to those most threatening to the code's integrity.

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80. 4.0% standard deviation; plus or minus 5.12% to an 80% confidence range. *See supra* note 78.

81. 3.5% standard deviation; plus or minus 4.48% to an 80% confidence range. *See supra* note 78.

82. *See infra* figure 2.

83. Standard deviation of 0.55%; plus or minus 0.70% to an 80% confidence range. *See supra* note 78.

Many of the study's conclusions have been summarized in table form, below. Figure 2 ignores "noise" and indicates the percentage that each of the *nine* interpretive techniques—the eight extra-code hermeneutics and relying solely on the code—was utilized. Figure 2 breaks down the findings as to early cases, late cases, and total cases for both the U.C.C. and the Federal Rules of Evidence. Figure 3 looks only to the 389 issues resolved by reference to extra-code materials and indicates the frequency with which each of the eight extra-code hermeneutics was employed.

**Figure 2**

**Percentage of time when code provision was interpreted that each of these extra-code hermeneutics was employed**

| | Suspenders | Contextualization | Concretization | Ambiguity/ Conflict | Lacuna | Supplement | Substitution | Transformation | TOTAL |
|---|---|---|---|---|---|---|---|---|---|
| Early UCC | 8.8% | 7.4% | 14.9% | 0.7% | 0.7% | 0.7% | 4.7% | 1.4% | 39.2% |
| Late UCC | 21.1% | 1.6% | 21.6% | 5.3% | 2.1% | 3.2% | 7.9% | 1.6% | 64.2% |
| Total UCC | 15.7% | 4.1% | 18.6% | 3.3% | 1.5% | 2.1% | 6.5% | 1.5% | 53.3% |
| Early FRE | 12.7% | 7.9% | 19.8% | 4.8% | 4.8% | 5.6% | 7.1% | 0.0% | 62.7% |
| Late FRE | 10.4% | 0.5% | 41.5% | 5.7% | 1.6% | 4.1% | 9.3% | 0.5% | 73.6% |
| Total FRE | 11.3% | 3.4% | 32.9% | 5.3% | 2.8% | 4.7% | 8.5% | 0.3% | 69.3% |

**Figure 3**

**Percentage of time when extra-code materials were utilized that each hermeneutic was utilized**

| | Suspenders | Contextualization | Concretization | Ambiguity/ Conflict | Lacuna | Supplement | Substitution | Transformation |
|---|---|---|---|---|---|---|---|---|
| Early UCC | 22.4% | 19.0% | 37.9% | 1.7% | 1.7% | 1.7% | 12.1% | 3.4% |
| Late UCC | 32.8% | 2.5% | 33.6% | 8.2% | 3.3% | 4.9% | 12.3% | 2.5% |
| Total UCC | 29.4% | 7.8% | 35.0% | 6.1% | 2.8% | 3.9% | 12.2% | 2.8% |
| Early FRE | 20.3% | 12.7% | 31.6% | 7.6% | 7.6% | 8.9% | 11.4% | 0.0% |
| Late FRE | 14.1% | 0.7% | 56.3% | 7.7% | 2.1% | 5.6% | 12.7% | 0.7% |
| Total FRE | 17.2% | 6.7% | 44.0% | 7.7% | 4.9% | 7.2% | 12.0% | 0.4% |

### *a. Belt and Suspenders*

The first extra-code hermeneutic utilized by courts is citing to caselaw and articles to buttress unambiguous readings of the code and official comments on the code (the "belt and suspenders" approach).[84] The mere recitation of the code rule often will be followed by one or several case cites.[85] This is a traditional style of American legal

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84. The author appreciates that there are those who argue that no rule can ever be "unambiguous" and that there is infinite openness in all texts. See, e.g., STANLEY FISH, IS THERE A TEXT IN THIS CLASS? (1980); Roland Barthes, *From Work to Text*, *in* IMAGE, MUSIC, TEXT 155 (Stephen Heath trans., 1977); Gary Peller, *The Metaphysics of American Law*, 73 CALIF. L. REV. 1151 (1985). The author believes, however, that experience shows that there is sense in speaking of the plain meaning of rules. Even if there is infinite textual openness in some contexts (such as poetry and literature), the institutional constraints of the judiciary constrict the range of acceptable interpretations, at least in the short run. *See* Richard A. Posner, *Law and Literature: A Relation Reargued*, 72 VA. L. REV. 1351 (1986).

85. *See, e.g.*, United States v. Wilson, 532 F.2d 641, 644 n.4, 1 Fed. R. Evid. Serv. (Callaghan) 222, 227 n.4 (8th Cir. 1976) ("Before any statement of a co-conspirator is admissible under the co-conspirator rule, FED. R. EVID. 801(d)(2)(E), proof is also required that the statements were made at the time of the conspiracy and in furtherance of it."); *cf.* Ross v. Black & Decker, Inc., 977 F.2d 1178, 1184-85, 36 Fed. R. Evid. Serv. (Callaghan) 983, 988 (7th Cir. 1992); United States v. Smith, 520 F.2d 1245, 1247 (8th Cir. 1975) (stating that FED. R. EVID. 801(d)(2)(E) itself allows a statement offered against a party that is "a statement by a coconspirator of a party during the course and in furtherance of the conspiracy"); Petroleo Brasileiro, S.A., Petrobras v. Nalco Chem. Co.,

argument, wherein legalists are reluctant to cite solely to a piece of legislation, and instead feel obligated to make reference to caselaw. Perhaps this as a carryover from America's common law heritage. In any event, "belt and suspenders" does not reduce the codes' code-quality, as the code operates as the *de facto* source of the rule.

The "belt and suspenders" technique was the second most frequently employed hermeneutic, accounting for eighty-nine acts and 160 extra-code citations. In eighty-three of these instances the "belt and suspenders" was the only technique relied upon during the court's interpretation of the issue. This means that 21.3% of the issues answered by citing extra-code materials were resolved solely by relying on "belt and suspenders."[86]

Since the extra-Code materials utilized in "belt and suspenders" applications are nearly, if not wholly, extraneous in ascertaining the legal rule, the instances of "belt and suspenders" can be set aside for purposes of assaying the extent to which courts directly relied upon the code. Calculated this way, 53.4% of the issues were resolved by looking only to the text of the code.[87] Additional figures are provided in Figure 4, below. This constitutes significant effective court reliance solely upon the text of the code to determine the appropriate legal rule.

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784 F. Supp. 160 (D.N.J. 1992).

86. Standard deviation of 2.1%; plus or minus 2.7% to an 80% confidence range. *See supra* note 78.

87. Standard deviation of 1.9%; plus or minus 2.5% to an 80% confidence range. *See supra* note 78.

**Figure 4** **First level correction: no cases + suspenders**

| | Number of issues | Issues resolved without consulting extra-code materials | Percent total issues resolved without consulting extra-code materials | Number of times issues resolved solely with suspenders | Total Issues resolved without extra-code references or solely with suspenders | Percentage of issues resolved without extra-code references, or solely with suspenders |
|---|---|---|---|---|---|---|
| Early UCC | 148 | 91 | 61.5% | 13 | 104 | 70.3% |
| Late UCC | 190 | 67 | 35.3% | 40 | 107 | 56.3% |
| Total UCC | 338 | 158 | 46.7% | 53 | 211 | 62.4% |
| Early FRE | 126 | 55 | 43.7% | 12 | 67 | 53.2% |
| Late FRE | 193 | 55 | 28.5% | 18 | 73 | 37.8% |
| Total FRE | 319 | 110 | 34.5% | 30 | 140 | 43.9% |
| GRAND TOTAL | 657 | 268 | 40.8% | 83 | 351 | 53.4% |

### *b. Contextualization*

The second extra-code hermeneutic used by courts is to cite to pre-code legal materials to clarify the legal context in which the code rule was born.[88] As with the "belt and suspenders" technique, contextualization most frequently is not employed to elucidate the text of the code; identifying the pre-code law often seems an afterthought, for the sake of completeness.[89] In the few instances when contextualization was used

88. *See, e.g.*, Commonwealth Bank & Trust Co. v. Keech, 192 A.2d 133, 135, 1 U.C.C. Rep. Serv. (Callaghan) 63, 66 (Pa. Super. Ct. 1963) ("The common law rule is to [quote a case and restatement section]. But this rule has been abrogated in Pennsylvania as to contracts for the sale of goods by § 2-203 of the Uniform Commercial Code."); Held v. Moore, 2 U.C.C. Rep. Serv. (Callaghan) 14, 16 (C.P. Pa. 1964); Opinion of Att'y Gen. of Md., 2 U.C.C. Rep. Serv. (Callaghan) 56, 58 (1964) (stating that one shoul consider, as an example, the impact of the Commercial Code upon the bill of sale" and proceeding first to outline the pre-code law).

89. *See, e.g.*, United States v. Jackson, 405 F. Supp. 938, 941-42, 1 Fed. R. Evid. Serv. (Callaghan) 56, 61 (E.D.N.Y. 1975) (citing to 10 pre-Code cases to substantiate the claim that "[i]n its present form, Rule 609(a) codifies a trend of federal cases epitomized by Luck v. United States, 348 F.2d 763 ([D.C. Cir.] 1965), which

to clarify the code rule, the pre-code law was used to identify a legal problem for which the court's proffered reading of the code served as a remedy.[90]

Contextualization comprised 6.7% of the extra-code hermeneutics.[91] Contextualization is a technique that is less frequently utilized as the code ages; it was the third most common technique found in the early U.C.C. and Federal Rules of Evidence cases, constituting 19.0%[92] and 12.7%[93] respectively of the early extra-code hermeneutics, but it accounts for only 2.5% and 0.7% respectively of recent extra-code interpretation. Usage of this interpretive tool probably diminishes over the life of the code because over time the code's doctrine becomes understandable on its own.

Because contextualization generally is used for reasons other than elucidating the code's text, an accurate gauge of the frequency with which courts rely primarily on the code's text would disregard the bulk of the instances of contextualization. Assuming that "belt and suspenders" and contextualization are unnecessary to interpreting the code, code issues were resolved without any reference to extra-code materials or by relying on "belt and suspenders" or contextualization (and not relying on any other type of extra-code hermeneutics) a full 56.3% of the time.[94] Additional information is provided in Figure 5, below.

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recognized the trial courts' obligation to exercise discretion in excluding evidence of convictions"); Jagger Bros., Inc. v. Technical Textile Co., 198 A.2d 888 (Pa. Super. Ct. 1964) (first reciting the relevant rule under the Code and then observing that "[p]rior to the Uniform Commercial Code the law was the same" and citing two cases).

90. *See, e.g.*, Roto-Lith, Ltd. v. F.P. Bartlett & Co., 297 F.2d 497, 499-500, 1 U.C.C. Rep. Serv. (Callaghan) 73, 76 (1st Cir. 1962) ("Section 2-207 changed the existing law . . . . Its purpose was to modify the strict principle that a response not precisely in accordance with the offer was a rejection and a counteroffer [citing two pre-code cases]. Now, within stated limits, a response that does not in all respects correspond with the offer constitutes an acceptance of the offer.").

91. Standard deviation 1.3%; plus or minus 1.6% to an 80% confidence range. *See supra* note 78.

92. Standard deviation 3.2%; plus or minus 4.1% to an 80% confidence range. *See supra* note 78.

93. Standard deviation 2.4%; plus or minus 3.1% to an 80% confidence range. *See supra* note 78.

94. Standard deviation 1.9%; plus or minus 2.5% to an 80% confidenee range. *See supra* note 78.

All subsequent extra-code hermeneutics are significantly involved in interpreting the code.

**Figure 5**

**Second level correction: no cases + suspenders + contextualization**

| | Number of issues | Number of issues resolved without consulting extra-code materials | Number of issues resolved solely with suspenders and/or contextualization | Number of issues resolved without extra-code materials, or solely with suspenders or contextualization | Percentage of issues resolved without extra-code materials, or solely with suspenders or contextualization |
|---|---|---|---|---|---|
| Early UCC | 148 | 91 | 21 | 112 | 75.5% |
| Late UCC | 190 | 67 | 43 | 110 | 57.9% |
| Total UCC | 338 | 158 | 64 | 222 | 65.7% |
| Early FRE | 126 | 55 | 19 | 74 | 58.7% |
| Late FRE | 193 | 55 | 19 | 74 | 38.3% |
| Total FRE | 319 | 110 | 38 | 148 | 46.4% |
| GRAND TOTAL | 657 | 268 | 102 | 370 | 56.3% |

### *c. Concretization*

The third extra-code technique is the use of caselaw and articles for the purpose of "concretizing" application of the code's abstract terms.[95] Under this technique, the code remains the starting point of the analysis. Caselaw simply is used to help determine how the rule operates in an actual case. Often the characterizations of facts found in other cases are distinguished away. The court cites to cases in such instances to indicate that the court is giving a decision that is not inconsistent with other courts' holdings.[96]

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95. *See, e.g.*, United States v. Castro-Ayon, 537 F.2d 1055, 1057-58, 1 Fed. R. Evid. Serv. (Callaghan) 243, 245 (9th Cir. 1976) (citing caselaw to determine whether an immigration proceeding is subsumed under the term "other proceeding" under FED. R. EVID. 801(d)(1)); Victor v. Barzaleski, 1 U.C.C. Rep. Serv. (Callaghan) 104, 106 (C.P. Pa. 1959) (eiting to caselaw to determine if U.C.C. § 2-315's requirement of a "contract for sale" made by a "seller" was satisfied where defendant had agreed to install a heating unit that defendant was to procure from another while acting as an intermediary); Miller v. Preitz, 2 U.C.C. Rep. Serv. (Callaghan) 88, 90-91 (C.P. Pa. 1964) (citing caselaw to determine who is included in the term "family or household," which is used in U.C.C. § 2-318).

96. *See* Gentile v. MacGregor Mfg. Co., 493 A.2d 647, 649, 41 U.C.C. Rep. Serv. (Callaghan) 15, 18 (N.J. Super. Ct. Law Div. 1985) ("I am mindful of *Newmark v. Gimbel's Inc.* . . . . Nonetheless, in reflecting on the transaction . . . .") (citations

Concretization is usually accomplished via post-code caselaw.[97] The need for "concretization" is a function of several characteristics of the code[98] and depends on the extent of desired uniformity.[99] Additionally, the extent of concretization for the purpose of achieving uniformity is a function of the age of the Code. Reliance increases as time advances because there are growing amounts of materials with which contemporary rulings need be consistent.[100]

The study shows that concretizing the application of the code's general principles consistently represents the foremost usage of caselaw in code interpretation. Concretization accounted for 168 of the 406 instances of extra-code interpretation for an aggregate of 41.4%.[101] Courts also tended to cite to multiple extra-code materials during each instance of concretization: 472 of the 1033 extra-code materials were cited to during concretizations. The study also shows that "concretization" was utilized differently with respect to the U.C.C. and Federal Rules of Evidence.[102]

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omitted).

97. *But see* Commonwealth v. Cohen, 199 A.2d 139 (Pa. Super. Ct. 1964) (applying a pre-code case to concretize the code, where the relevant U.C.C. provision matched the prior statute nearly word for word).

98. *See infra* part III.

99. *Compare* Herbert Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097 (1952) (arguing that the Model Penal Code must provide a coherent theory of culpability and punishment but noting that specific definitions of substantive crimes should vary from jurisdiction to jurisdiction depending on the citizens' values and sensitivities) *with* U.C.C. § 1-102(2)(c) (1990) (stating that the "[u]nderlying purposes and policies" of the U.C.C. are, inter alia, "to make uniform the law among the various jurisdictions").

100. *Cf.* 1 U.C.C. Rep. Serv. (Callaghan) at iii (1965) ("It is the hope of the editors that this volume and the volumes which will follow it over the years, by bringing together in one place all judicial interpretations of the Uniform Commercial Code, will contribute in some measure to achieving the goal of uniformity of interpretation of the Code.").

101. Standard deviation 2.4%; plus or minus 3.1% to an 80% confidence range. *See supra* note 78.

102. These code-specific findings confirm hypotheses asserted during this Article's examination of the differing drafting characteristics of the Codes and therefore will be discussed at that time. *See infra* text accompanying notes 196-200.

*d. Ambiguities and Conflicts*

The fourth extra-code hermeneutic is court reliance on extra-code materials to resolve ambiguities and conflicts in the code itself.[103] "Ambiguities" refer to cases where the rule is unclear due to imperfect drafting.[104] "Conflicts" involve situations where two or more provisions appear to be applicable and whose simultaneous application would lead to conflicting legal outcomes. Conflicts are most frequently found when courts must determine whether a particular code provision is to be read on its own or in light of other code provisions.[105] Post-code caselaw is also referenced to resolve conflicts between the code and other sources of law, such as the Bankruptcy Code[106] and the United States Constitution.[107]

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103. The study treats ambiguities and conflicts as one interpretive maneuver because of their similarity and the difficulty often involved in distinguishing between them.

104. *See, e.g.*, Universal C.I.T. Credit Corp. v. Ingel, 347 Mass. 119, 125, 2 U.C.C. Rep. Serv. (Callaghan) 82, 87 (1964) (confronting the ambiguity in U.C.C. § 3-302(1)(c)'s language stating that "[a] holder in due course is a holder who takes the instrument . . . without notice that it is overdue or has been dishonored" as to whether "notice" is actual or reasonable).

Often there is only a thin line between concretization and ambiguity. This study nonetheless maintains that there is a real distinction between these two hermeneutics, where concretization refers to inevitable difficulties attending the application of abstract rules to unanticipated factual scenarios, and ambiguity refers to avoidable uncertainties in application.

105. *See* Dowty Communications, Inc. v. Novatel Computer Sys., Inc., 817 F. Supp. 581, 590, 19 U.C.C. Rep. Serv. 2d (Callaghan) 73, 86 (D. Md. 1992) (holding that the U.C.C.'s general requirement of good faith disallows reliance on a contract provision limiting consequential damages where that party has acted in bad faith, even though bad faith is not among the enumerated bases for disallowing disclaimers of consequential damages under § 2-719(3)); Herm Hughes & Sons, Inc. v. Quintek, 834 P.2d 582 (Utah Ct. App. 1992) (exploring the issue of whether U.C.C. § 2-207 is to be applied only if § 2-204's requirement that there has been an "agreement" between the parties first has been met. Section 2-207 provides that certain "expression[s] of acceptance or . . . written confirmation[s]" can operate as an acceptance even though they "state[] terms additional to or different from those offered or agreed upon," without mentioning "agreement." The question of § 2-207's relationship to § 2-204's "agreement" requirement arises because although § 2-204 appears to be a general provision, it is unclear whether § 2-207 is intended to be an exception to, or an application of, § 2-204's general rule.).

106. *See, e.g.*, *In re* Marko Elecs., Inc., 145 B.R. 25, 19 U.C.C. Rep. Serv. 2d (Callaghan) 106 (Bankr. N.D. Ohio 1992) (finding that § 2-702(3) grants a seller a right to reclaim that is superior to a judgment lien creditor under 11 U.S.C. § 546(c)).

107. *See* United States v. Curry, 977 F.2d 1042, 36 Fed. R. Evid. Serv. (Callaghan) 706, 715 (7th Cir. 1992) (citing to caselaw to identify the relationship between the hearsay exceptions and the Confrontation Clause).

Extra-code materials were utilized in twenty-eight instances to resolve ambiguities and conflicts, meaning that this technique was employed 4.3% of the times a code provision was interpreted.[108] This technique was relied upon more frequently, to a statistically significant extent,[109] when interpreting the Federal Rules of Evidence than when interpreting the U.C.C.: conflict/ambiguity was used while interpreting 3.3%[110] of the U.C.C. issues and 5.3%[111] of the Federal Rules of Evidence issues. This suggests that the U.C.C. was drafted more clearly, since invoking this technique is a response to unclear drafting.

*e. Lacuna-Filling*

Whereas the first four applications of caselaw discussed above can be characterized as efforts to uncover the latent meaning of the code provisions, the next four usages of caselaw involve hermeneutics that are significantly more supplemental in nature.

The fifth extra-code hermeneutic used by courts is citing to caselaw and articles to fill lacunae in the Codes.[112] There are "intended" and "unintended" lacunae. "Intended lacunae" are exemplified by code references to concepts belonging to other doctrinal fields that are not defined within the code.[113] Citation to caselaw to fill intended lacunae

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108. Standard deviation 0.79%; plus or minus 1.0% to an 80% confidence range. *See supra* note 78.

109. There is at least a 95% certainty that these two percentages are statistically significant. The formula for determining whether the difference between two means has statistical significance is (mean1 - mean2) divided by the square root of the sum of the squares of the standard deviations of the means. If the resulting number is between -1.96 and +1.96, there is a statistical difference between the means, to a 95% certainty. *See supra* note 78.

110. Standard deviation 0.97%; plus or minus 1.2% to an 80% confidence range. *See supra* note 80.

111. Standard deviation 1.3%; plus or minus 1.6% to an 80% confidence range. *See supra* note 78.

112. *See, e.g.*, Government of the Virgin Islands v. Gereau, 523 F.2d 140 (3d Cir. 1975) (citing to the Federal Rules of Evidence to show that an error had been made and then citing to more than 50 pre-code cases to determine when an error in factfinding necessitates overturning a jury verdict).

113. For example, the U.C.C. uses the term "consequential damages" without defining that tort principle. *See* U.C.C. § 2-719. Courts thus have relied on caselaw to elaborate the proximate cause concepts necessary for ascertaining what damages are consequential. *See* Scanlon v. Food Crafts, Inc., 193 A.2d 610 (Conn. Ct. App. 1963) (quoting pre-code case for proposition that the seller takes "the plaintiff as it found him" for purpose of ascertaining consequential damages arising from breach of warranty, dismissing seller's claim that injury was due to plaintiff's physical infirmity); Seaside Resorts, Inc. v. Club Car, Inc., 416 S.E.2d 655 (S.C. Ct. App. 1992).

is wholly consistent with the Field Comprehensive and Perpetual Index models of codification; a corollary of noncomprehensive codification is reliance on extra-code materials to identify law outside the codified fields that intersects with the codified field.

"Unintended lacunae" refers to matters not addressed by the code that are integral to the code's subject matter.[114] Although the presence of unintended lacunae means that the code has fallen short, the fact that the code "gives out" at some point and requires external input, is a reflection of the limitations of *all* legal materials, not a proof that the American codes are not true codes or a disproof of the very possibility of codification.[115] Frequency of unintended lacunae does, however, indicate the quality of the drafting.

Even when cases are relied upon to fill the unintended lacunae, judging the impact of the code requires determining whether the extra-code materials continue the doctrinal direction elected by the code's drafters.[116] To the extent they do, the code has had a significant impact on making the law uniform by selecting one among several jurisprudential approaches to the doctrine.

"Lacuna-filling" was undertaken only fourteen times during the course of the 657 issues. "Lacuna-filling" was relied upon 1.5%[117] of the times that a U.C.C. provision was analyzed and in 2.8%[118] of the instances a Federal Rules of Evidence provision was interpreted. This is not an alarming frequency, suggesting that the two examined Codes are well-drafted. There is greater than 95% certainty that the differences in frequency of "lacuna-filling" between the U.C.C. and Federal Rules of Evidence are statistically significant.[119] This is further evidence that the U.C.C. is a better-drafted code.

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114. *See* Watson v. Uniden Corp. of America, 775 F.2d 1514, 1515, 42 U.C.C. Rep. Serv. (Callaghan) 96, 98 (11th Cir. 1985) (citing to caselaw holding that purchaser cannot recover for breach of express or implied warranties if the product was not used in a normal manner, despite the absence of such an explicit caveat in U.C.C. § 2-313 and § 2-314; the subrule of the eaveat is organically part of the rule of breaeh and the fact that it was not codified constitutes a lacuna).

115. Recall that European jurisprudes—the analysts of the codes that have most aspired to being exhaustive—have long abandoned the expectation that a well-crafted eode can cover all eventualities, and instead have spent their energies clarifying the appropriate types of external input that should be brought to code interpretation. *See supra* notes 22-23.

116. *See infra* part IV.

117. Standard deviation 0.66%; plus or minus 0.85% to an 80% eonfidence range. *See supra* note 78.

118. Standard deviation 0.92%; plus or minus 0.12% to an 80% confidence range. *See supra* note 78.

119. *See supra* note 109.

*f. Supplement*

The sixth extra-code technique is to utilize caselaw as a supplement to the code. This is similar to, but analytically distinct from, using caselaw to fill lacunae. Whereas the need for additional law is patent in lacuna-filling, supplementing provides a rule different from what otherwise would have been applicable had the Code language alone been applied. Most frequently, the supplementing is performed in response to statutory invitation.[120] Though textually justifiable, frequent resort to supplementary principles could swallow up the code. In fact, supplementing through invitation is undertaken relatively infrequently, accounting for twenty-one instances of interpretation of 657 issues, constituting an aggregate of 3.2% of the time.[121]

The study found only two instances where the supplementing was undertaken without statutory invitation. This was justified in one case by claiming that the codified rule was intended only partially to modify the common law rule and that the code codified only the modification.[122] The other court asserted that the code did not codify all the relevant doctrines.[123] Supplementing without invitation pushes the Perpetual Index model—which understands that the code is not the sole source of law in its field—to its limits. Although frequent uninvited supplementing

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120. *See, e.g.*, Adkinson v. International Harvester Co., 975 F.2d 208 (5th Cir. 1992) (citing to 15 cases to support its holding that indemnity and contribution constitute general equitable principles that supplement the U.C.C. under § 1-103); United States v. White, 974 F.2d 1135, 1137-38, 36 Fed. R. Evid. Serv. (Callaghan) 779, 781-82 (9th Cir. 1992) (citing to seven eases after reciting FED. R. EVID. 501, which provides that "the privilege of a witness . . . shall be governed by the principles of the common law"); Hochgertel v. Canada Dry Corp., 187 A.2d 575 (Pa. 1963) (citing to caselaw in response to official comment 3 of U.C.C. § 2-318's statement that the code was not intended to restrict the caselaw in this field).

121. Standard deviation 0.69%; plus or minus 0.88% to an 80% confidence range. *See supra* note 78.

122. *See* King v. Fordice, 776 S.W.2d 608, 611 (Tex. Ct. App. 1989) (holding that the common law parol evidence rule allowing evidence that the parties had not intended that a writing be enforceable was neither modified nor displaced by U.C.C. § 2-202).

123. *See* Mid-South Packers, Inc. v. Shoney's, Inc., 761 F.2d 117, 41 U.C.C. Rep. Serv. (Callaghan) 38, 41 (5th Cir. 1985) (holding that "[r]equirements contracts are recognized in Mississippi" under U.C.C. § 2-306(1) and then citing caselaw to support the assertion that "an essential element of a requirement contract is the promise of the buyer to purchase exclusively from the seller either the buyer's entire requirements or up to a specified amount," notwithstanding the absence of any such language in § 2-306(1). Courts have understood the exclusivity requirement to derive from the need for mutuality; *see, e.g.*, Propane Indus., Inc. v. General Motors Corp., 429 F. Supp. 214, 219 (W.D. Mo. 1977).).

would threaten many code objectives, limited instances that are supported by legislative history less undercut the efficacy of the code.[124]

*g. Substitution*

Under the seventh extra-code technique, courts use caselaw as a "substitute" for the codes themselves.[125] This is a technique that threatens several of a code's aspirations. Though it is true that even the very language of a rule found in the code can be subject to a multiplicity of interpretations, abandoning the code's formulation and relying on different court opinions' reformulations introduces a greater risk that the rules will be substantively refashioned and that uniformity will be lost. Additionally, as will be discussed in the next section, substitutions sometimes transform the rules.

The study found that courts relied on previous cases' articulation of the code's rule 8.5% of the times that code provisions were interpreted.[126] In only a few of these instances was the substitution a significant alteration of the rule. Although substitutions do allow for the subtle reshaping of the code's rules, in practice the code's basic rule generally prevails. From the perspective of maintaining the code as the authoritative legal source, however, substitutions are clearly problematic. The study did not observe statistically significant differences between the frequency of substitutions in the U.C.C. and in the Federal Rules of Evidence.

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124. In fact, the *King* court cited to treatises and legislative history to support its holding. *See King*, 776 S.W.2d at 611.

125. *See* United States v. Figueroa, 976 F.2d 1446, 1453, 36 Fed. R. Evid. Serv. (Callaghan) 671, 678 (1st Cir. 1992) (citing quotation from a case for FED. R. EVID. 401's formulation: "As we have explained: 'The admissibility of "other acts" evidence depends on a two-part analysis. First, "other acts' evidence must be excluded if 'it is relevant *only* because it shows bad character . . . ." Second, the district court must weigh the probative value of the "other acts" evidence against any unfair prejudice to the defendant; and it is only when the risk of unfair prejudice "substantially" outweighs its probative value that the evidence is to be excluded.'" (citations omitted)); John H. Wickersham Eng'g & Const., Inc. v. Arbutus Steel Co., 1 U.C.C. Rep. Serv. (Callaghan) 49, 52 (C.P. Pa. 1962) (referencing U.C.C. § 2-201(2) but quoting a case for the formulation of the rule: "In [an earlier case] the Supreme Court [of Pennsylvania] decided that a memorandum signed by the party sought to be charged is not necessary when . . . .").

126. Standard deviation 0.10%; plus or minus 1.4% to an 80% confidence range. *See supra* note 78.

*h. Transformation*

Under the eighth extra-code technique, courts sometimes rely on caselaw to "transform" the rule articulated by the code. There are two general patterns to transformations. First, transformations of some degree frequently accompany substitutions.[127] Thus, merely restating a code rule by quoting a case may result in a transformation.

Under the second pattern, in response to a scenario where application of the rule would frustrate the core purposes behind the rule, a court elects to circumvent the rule's application through assorted "legal" justifications[128] or, less frequently, forthrightly rewrites the code section.[129] Subsequent courts then overlook the pressing factual particulars and apply the earlier court's holding as if it were the general

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127. *See* United States v. White, 972 F.2d 590, 599, 36 Fed. R. Evid. Serv. (Callaghan) 800, 805 (5th Cir. 1992) (stating that "[i]nterpreting [FED. R. EVID. 404(b)], this circuit holds that such evidence is admissible if (1) it is relevant to an issue other than the defendant's character, and (2) the probative value of the evidence substantially outweighs the undue prejudice. United States v. Beechum, 582 F.2d 898, 911 (5th Cir. 1978) (en banc)."). *Beechum* is not only a substitution but also a transformation. The second prong appears nowhere in the rule itself. Moreover, the second prong is a transformation of Rule 403. Whereas Rule 403 allows relevant evidence to be excluded only if the evidence's "probative value is substantially outweighed by the danger of undue prejudice"—placing the burden of proof on the party seeking to exclude the relevant evidence—*Beechum* places the burden on the party seeking to introduce the evidence, requiring the party to show that "the probative value of the evidence substantially outweighs the undue prejudice." *Beechum*, 582 F.2d at 911.

128. An alternative resolution—albeit an approach not generally deemed to be an appropriate justification in the United States—would be to apply Aristotle's understanding of law and equity and assert that the case sub judice is not properly governed by law but must be treated by equity. *See infra* note 148 and accompanying text.

129. *See* Roto-Lith, Ltd. v. F.P. Bartlett & Co., 297 F.2d 497, 499, 1 U.C.C. Rep. Serv. (Callaghan) 73, 76 (1st Cir. 1962) (holding that U.C.C. § 2-207(1), which allows a "definite and seasonable expression of acceptance or a written confirmation" to operate as an acceptance even if it states additional terms "unless acceptance is expressly made conditional on assent to the additional or different terms," must be construed such that the code's language of "expressly made conditional" is satisfied by the mere presence of an additional "condition materially altering the obligation solely to the disadvantage of the offeror").

rule.[130] The result is that a rule inconsistent with the code rule becomes either the coextensive or dominant canon.

While transformation hermeneutics are the most damaging interpretive technique to the ends of a code, transformations were observed in only six instances, or only 0.3% of the times that the codes were interpreted.[131] An important recent article written by Professor Izhak Englard, addressed earlier in this essay, assessed California's Code experience by drawing conclusions based on a single transformation case.[132] That article consequently is subject to the criticism of misleadingly relying on an unrepresentative case, unless the author can show that transformations are a frequently employed hermeneutic. Even if transformations in the California Code were not a frequent occurrence, Professor Englard might respond that the presence of even one instance of "transformation" makes the entire edifice of the Code vulnerable, since even one event of transformation shows that transformations *could* take place at any time. Such a defense ought not be given much weight, however. After all, over a combined fifty-year experience with two significant codes, there has been very little transformation hermeneutics.

Further support for this study's finding that transformations occur only seldomly comes from examining the literature accompanying current efforts to revise Article 2 of the U.C.C. Of the numerous recommendations made by various commentators and by the Permanent

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130. For example, one of the issues in *Seaside Resorts* was whether the buyer had waived his right to warranty due to an alleged failure to notify the seller under U.C.C. § 2-607(3), which unqualifiedly states that "the buyer must . . . notify the seller of breach *or be barred from any remedy*." Seaside Resorts, Inc. v. Club Car, Inc., 416 S.E.2d 655, 19 U.C.C. Rep. Serv. 2d (Callaghan) 60 (S.C. Ct. App. 1992) (emphasis added). The court casually relies on an earlier court's decision for the proposition that "if the seller is aware the buyer may claim a breach of warranty with respect to the goods prior to the buyer's formal assertion of the claim, the reason for notification has been satisfied" and concluded that U.C.C. § 2-607(3)'s requirements have been met. *Seaside Resorts*, 416 S.E.2d at 659. Despite the facts that there are legitimate arguments for why a bright-line rule is preferable to a standard and that the drafters of the U.C.C. made a clear election of an unqualified bright-line rule, the *Seaside Resorts* court unflinchingly transformed the U.C.C. rule by relying on the earlier case. *See also* Dowty Communications, Inc. v. Novatel Computer Sys., Inc., 817 F. Supp. at 589, 19 U.C.C. Rep. Serv. 2d (Callaghan) 73, 85 (D. Md. 1992) (relying on RRX Indus., Inc. v. Lab-Con, Inc., 772 F.2d 543 (9th Cir. 1985), which introduced an entirely new basis for disallowing a limitation of consequential damages provision nowhere mentioned in U.C.C. § 2-719(3), without carefully considering the circumstances of *RRX*'s ruling).

131. Standard deviation 0.67%; plus or minus 0.85% to an 80% confidence range. *See supra* note 78.

132. *See* Englard, *supra* note 51.

Editorial Board of the U.C.C., the vast majority came from academics.[133] It is significant that the engines of code revisions were *not* maverick judges who deviated from problematic code provisions. Judges have usually adhered to the code provisions, notwithstanding weaknesses in such provisions that were noted by other judicial opinions and the secondary literature.[134]

### *D. General Conclusions About the Significance of the Codes*

Before claiming that a code has suffered a "loss of identity" by becoming "immersed in the sea of common law,"[135] it is necessary to examine carefully *how* extra-code materials are utilized by courts applying the code. In the cases of the Uniform Commercial Code and Federal Rules of Evidence, court opinions have relied significantly on the text of the codes in identifying the law. The study found that 40.8% of the code issues were resolved without recourse to extra-code legal materials, which actually understates courts' effective reliance solely on the codes. Discounting extra-code citations in "belt and suspenders" and contextualization hermeneutics, courts effectively resolved a full 56.3% of the code issues solely by relying on the codes. Further evidence of courts' significant reliance on the codes is that the technique of concretization—where the code remains primary since extra-code materials are used merely to clarify the code's application—accounted for 168 of the remaining 280 instances of extra-code hermeneutics (60%). Aggregating concretization with contextualization and "belt and suspenders," nearly 82% of the code issues were resolved by techniques which used the code's text as the primary source of the rule. Finally, it must be recalled that all these figures refer to courts' use of caselaw in full-blown litigations that were reported by specialized reporter services. The sample thus is unrepresentative of pracititioners' everyday experiences in ascertaining the law. In all likelihood, practitioners rely even more heavily on the text of the codes alone.

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133. *See* PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE, UNIFORM COMMERCIAL CODE ARTICLE 2: PRELIMINARY REPORT 26-29 (1990) (buyer in ordinary course of business); *id.* at 30-31 (good faith); *id.* at 31-33 (course of dealing and usage of trade).

134. *But see* Douglas G. Baird & Robert Weisberg, *Rules, Standards, and the Battle of the Forms: A Reassessment of* § 2-207, 68 VA. L. REV. 1217 (1982) (detailing court transformations of U.C.C. § 2-207 due to its unworkability).

135. Englard, *supra* note 51, at 15.

## III. Comparative Anatomy of Several Recent American Codifications

While the recent American codfications of the common law have all belonged to the Perpetual Index model, it would be a mistake to conclude that all have been drafted identically. Similarly, while Part II's study shows that courts have primarily had recourse to the texts of the U.C.C. and the Federal Rules of Evidence to ascertain the law, it would be an error to conclude that both codes have had identical experiences in the hands of legal professionals. This Part of the Article joins these two observations. It identifies the drafting characteristics that impact post-code application and growth of the law, notes that the drafting profiles of the recent American codes have differed one from the other, and empirically correlates different codes' post-code jurisprudential experiences with their character profiles. Sub-part A will examine the effects of whether the code's rules are voiced as abstractions or are sensitive to facts. This inquiry raises two questions: whether the code uses rules or standards, and whether the code drafters believed the code's rules to be transubstantive or context-specific. Sub-part B examines differing rules of construction found in the codes, including various code provisions permitting courts to make equitable adjustments, diverse provisions inviting courts and legislatures to help further develop the law, and different approaches regarding the code's relationship to pre-code caselaw.

### *A. The Form of the Code's Rules: Abstract or Fact-Sensitive*

One of the most significant factors determining the code's impact on the application and development of the law is the extent to which the code's edicts are expressed by reference to facts or instead are voiced in abstract terms. Some French codifiers have trumpeted the strength of their code's abstraction while ridiculing the American tendency for "facts to harden into law."[136] Although the virtue of the French approach is highly dubious—as will be discussed herein—the French observation that American codifications are more fact-bound is, in general, correct. First, the differences between these two approaches will be explored from a jurisprudential perspective. Two distinct aspects of the debate emerge as to whether legal rules should be cognizant of factual particulars: (1) whether the code employs rules or standards, and (2) whether the code's rules are deemed to be transubstantive or highly context-specific. Next, the American codes' placement along each of these two continui will be

136. Nicholas, *supra* note 25, at 12.

described. Finally, the hypothesis generated during the jurisprudential discusssion will be empirically corroborated by reference to statistical findings from Part II's study.

### 1. JURISPRUDENTIAL CONSIDERATIONS

The question of whether legal rules should be expressed in abstract or factual terms is a composite of two distinct jurisprudential queries. The first is the question of whether legal edicts should be articulated such that relatively indisputable and clear factual predicates trigger the law's application, or whether the law should be expressed in terms of the abstract "policy" animating the law. This is the rules/standards debate found in American jurisprudence.[137] The second question relating to law's relationship to facts is whether legal principles are "transubstantive." To state it differently, the question is whether legal principles are sufficiently general to be operative across disparate factual contexts without need for custom tailoring, or whether legal rules are primarily the resolutions of local conflicting interests that perforce change from context to context. If the latter is the case, the law must be expressed by reference to facts if the rules are to be clear and relatively self-executing.[138]

#### *a. Rules vs. Standards*

The question of whether legal statements should be expressed in terms of fact-specific rules or abstract principles has a long lineage in American jurisprudence.[139] The advantage of fact-specific rules is that the rules clearly signal to people their civic duties.[140] This, it is hoped, preserves individuals' liberty and constrains judges from imposing their

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137. *See* Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 24, 57-69 (1992).

138. Discussions with Professor Roberto M. Unger clarified that this is a distinct inquiry from the familiar rules/standards debate.

139. *See, e.g.*, FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISIONMAKING IN LAW AND IN LIFE (1991); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992); Dunean Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1687-1713 (1976); Margaret J. Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781 (1989).

140. *See* Bodenheimer, *supra* note 5, at 21 ("If court decisions are based . . . on abstract, general rules divorced from individual facts, and the Code, rather than a concrete court decision, is regarded as the authoritative source of decisional law, one can never be certain, because of the ever-present ambiguity of generalized language, whether or not a Code provision will be applied in a future case.").

personal values.[141] Rules, it is asserted, are nearly self-executing. It is better that the law determining contract formation hinge on fact-specific tests like the "mailbox" rule and U.C.C. section 2-207 (Battle of the Forms), claim the advocates for "rules," than for the Code merely to state that a "valid[] agreement" hinges on "[t]he consent of the parties who place themselves under an obligation."[142] The latter formulation inevitably requires the judge to look at the entirety of the factual record in coming to a subjective determination.

The cost of rules, according to advocates of standards, is that rules necessarily are simultaneously over- and under-inclusive[143] because a rule can never perfectly express its animating policy goals. Ensuring maximally "just" legal outcomes inevitably requires granting discretion to the legal decisionmaker[144] to fashion the precise rule ex post;[145] rules' predictability merely guarantees reliably imperfect outcomes. Rather than prematurely conditioning application of a rule on difficult-to-predict factual predicates, standards state the law's policy goals, speaking in abstract as opposed to factually specific terms.

To the extent that codes aspire to make the law knowable and to constrain judges, codes should utilize rules rather than standards. A code that elected to employ standards and use abstract principles could be expected either to generate a broad range of outcomes or to encourage court reliance on post-code caselaw to generate concrete rules. Which outcome obtains is a product of culture-specific factors. French legalists' official disavowal of binding precedent has led to a broad range of legal outcomes.[146] The American proclivity for consistency across different

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141. Sullivan, *supra* note 137.

142. C. CIV. art. 1108, *quoted in* Nicholas, *supra* note 25, at 9.

143. In a recent article, Professor Louis Kaplow disputes the common understanding that rules are simultaneously over-inclusive and under-inclusive. He argues that rules are only over- or under-inclusive relative to less-complex or more-complex standards. His argument, however, is predicated on the assumption that there can be a rule equivalent of any standard. Kaplow, *supra* note 139, at 586-87. ("[A] rule cannot be over- or under-inclusive relative to a standard if one is comparing the standard to the rule equivalent to the standard."). Kaplow's argument thus proceeds by assuming precisely what others dispute: that if law-makers were willing to invest the time, they *could* develop a rule that anticipates all the eventualities. It is the infinitude of future permutations in conjunction with human legislators' finitude, however, that leads many (including this author) to believe that "rule equivalents" to a well-drafted standard cannot exist.

144. Sullivan, *supra* note 137, at 58-59

145. Kaplow, *supra* note 139, at 559.

146. *Cf.* Nicholas, *supra* note 25, at 12 ("Whether or not in a particular case there has been the requisite contract (and when and where it was given) is a matter for the judges of fact to decide.").

litigations has led American courts to rely on extra-code legal materials.[147]

Rules advocates must address how much "justice" is appropriately sacrificed in the rigid adherence to predetermined rules. A way to lessen potential injustice is to grant judges discretion to impose equitable corrections when applying the rule would produce "unfair" results. There are two forms that these grants could take. The first form is an outright grant to judges to deviate from the rule's application. This is derivative of the classical Aristotelian approach to law and equity, which asserts that the appropriate rule can comprehend most cases, but that there are some cases that simply cannot be ex ante subsumed under a rule; the deficiency is not with the law but is inherent in the case, and justice in those situations thus requires deviation from the general rule.[148] A few of the American codifications employ this type of equity grant.[149]

The second form that an equitable grant can take is a remedy to American discomfort with the theoretically limitless discretion that a strict Aristotelian approach affords. Under the second approach, equitable alternatives to the dominant doctrine are themselves turned into rules (they are "rulified"). Judges are permitted to invoke these rulified equitable doctrines, which permit outcomes at variance with what the narrowly applicable code provision would have generated on its own, when application of the dominant rule would result in an unpalatable outcome. This second form of equity limits the judges' discretion, by allowing judges recourse only to a predefined affirmative rule, rather than allowing their unfettered options to resolve the controversy as they sees fit. The second approach characterizes the approach generally favored in American jurisprudence and is found in most of the American codes.

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147. Ambiguity attends rules as well as standards, leading American courts to cite to extra-code materials to concretize. There is less need for concretization, however, where codes use rules. *See infra* text accompanying notes 192-95.

148. ARISTOTLE, NICOMACHEAN ETHICS 5:10 (Terence Irwin trans., 1985) ("[T]he equitable is not just in the legal sense of 'just' but as a corrective of what is legally just. The reason is that all law is universal, but there are some things about which it is not possible to speak correctly in universal terms. Now, in situations where it is necessary to speak in universal terms but impossible to do so correctly, the law takes the majority of cases, fully realizing in what respect it misses the mark. The law itself is nonetheless correct. For the mistake lies neither in the law nor the lawgiver, but in the nature of the case.").

149. *See infra* text accompanying notes 222-25.

*b. Is Law Context-Specific or Transubstantive?*

The second aspect of the relationship between law and fact involves the question of whether general legal principles are operative across disparate factual contexts, or whether legal rules are resolutions of local conflicting interests that perforce differ from context to context.[150] This is independent of the rules/standards debate. For example, one could imagine a legal system utilizing a rule detailing many concrete tests to determine whether there had been an agreement to support the finding of a contract, rather than a standard that merely defined contract as an agreement to be bound. This fact-conscious rule, however, could be applied identically without regard to the context: in business relationships among sophisticated and unsophisticated businesspeople, bargains between merchants and consumers, agreements between children and parents, and employment contracts between sophisticated business owners and uneducated non-unionized workers, for example. In such a circumstance, the legal system's code could be described as factually sensitive at the local rules-standard level, but fact-insensitive at the broader level of differing factual contexts.

The second aspect of fact-sensitivity presents another way of asking what constitutes the "discrete" areas of the law within which rule consistency is expected. After all, implicit in French-style abstractionism is a jurisprudence that asserts that a simple legal principle is operative over vast factual landscapes. For the code to be determinate, the differences across these landscapes must not be legally significant—quite a controversial jurisprudential position. Indeed, even assuming that there are broad principles that operate across different fact patterns,[151] it is

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150. *Cf.* Robert Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718 (1975) (criticizing the Federal Rules of Evidence's employment of one transubstantive set of rules for all kinds of cases).

151. Ronald Dworkin and Duncan Kennedy argue that law is undergirded and structured by deep principles. Dworkin argues that proper legal analysis will uncover a unitary theory that is implicit in the legal materials and that coherently justifies all of the legal materials, save the "mistakes" that the coherent theory justifies identifying as such. *See, e.g.*, Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1087-1101 (1975). While Kennedy also connects specific outcomes of cases to meta-theories, he argues that no *single* grand theory can account for the cases. Instead, the legal materials map onto one of two fundamentally opposing grand orientations—individualism or altruism. Kennedy, *supra* note 139, at 1685-57. British legal scholar Patrick Atiyah promotes the jurisprudential position rejecting the possibility of locating a single general legal theory that is applicable across all scenarios. *See* PATRICK S. ATIYAH, ESSAYS ON CONTRACT 16 (1986) (arguing against the notion that "it is possible and useful to still think in terms of general principles of contract" and observing that "there are few contracts today which are not governed by specific rules which in some measure derogate from the general law").

another matter to assert that the differing facts are legally irrelevant and that the appropriate legal outcome should be identical across these different contexts.

In other words, even if general principles are operative in law, "just" outcomes may very well be highly context-dependent. Stated differently, the "just" result may indeed be a function of unique situational specifics that must be taken into account to solve any particular problem. Further, justice may require that even small changes in situational specifics yield different legal outcomes.[152] Under this view of law, there is no strict separation between law and facts, and the American format of context-sensitive rules is the only way to more precisely state the law.[153] Litigators' tendencies to eschew broad principles and search for cases that are factually similar to the litigated matter is a manifestation of the interconnection between law and facts.

The body of law that perhaps best illustrates the inseparability of fact from law is torts. The *legal* determinations of "reasonable prudence" and "negligence," for example, are virtually meaningless without reference to the paradigmatic factual scenarios identified by countless common law adjudications as either satisfying or falling outside these legal concepts.

Antenuptial contracts offer another good example of the primacy of particular contexts in determining the precise content of the legal rule. Prior to 1970 nearly all American courts refused to uphold provisions within antenuptial agreements that sought to determine spouses' rights and obligations upon divorce.[154] These courts did not dispute the value of allowing people to transform their agreements into legally enforceable contracts—the dominant way in which contemporary American law

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152. Context dependency has an analogue in physics. Despite physicists' near complete understanding of the laws of mechanics with respect to interactions between atoms, they are incapable of expressing the results of the physical laws upon three bodies in a fixed relationship that yields determinate results. Instead, physicists must undertake new calculations that take account of a variety of situation-specific variables. Moreover, chaos theory describes why even minuscule changes in starting conditions may result in wildly different solutions. *See* ROGER PENROSE, THE EMPEROR'S NEW MIND 170-74 (1990).

The inability to yield determinate results solely by reference to the abstract "laws" of physics is not the result of an inadequate grasp of the physical laws at work, but is a result of context-specific variables which must always be considered in calculating any particular solution. The expressions of the physical laws are a function of the starting conditions. The analogy to law is that even if pristine principles are at work in the law, the results of these principles' interactions may not be determinate without making reference to situational specifics.

153. For a useful overview of the relationship between "fact" and "law" in American jurisprudence, see WIGMORE, *supra* note 36, § 1, at 2-6 n.2.

154. *See* DAVID WESTFALL & GEORGE P. MAIR, ESTATE PLANNING LAW AND TAXATION 9A.03 (2d ed. 1989).

conceptualizes contract.[155] These courts nonetheless explained that the specific context of marriage mandated that such agreements not be upheld, asserting that allowing antenuptial contracts would weaken the institution of marriage and facilitate divorces.[156] Even today, when provisions in antenuptial contracts regarding the spouses' rights upon divorce are enforceable, "general" contract principles such as good faith take on a very different legal meaning in the specific context of antenuptial agreements. For example, in most states it is conclusively presumed that the parties do not deal at arms length but rather "occupy a relationship of mutual trust and confidence and as such they must exercise the highest degree of good faith, candor, and sincerity in all matters bearing on the proposed agreement."[157] The requirements of good faith are thus more strict in the context of antenuptial contracts than for many other types of contracts.[158]

To the extent that factual contexts are significant, the French Code and other codifications utilizing abstract statements offer only limited guidance to lawyers and vest significant discretion in the judges at the level of application. A code not sensitive to the significance of factual contexts can be expected to have one of several consequences: the legal decisions often will be unjust due to the mechanical operation of the rules; the legal decisions will appear to be inexplicably inconsistent; or the actual legal rule will vary considerably from the merely abstract code rule, while the caselaw becomes the de facto source that states the law's application across the various contexts.

### 2. THE AMERICAN CODES: ABSTRACT OR FACT-SENSITIVE?

#### *a. Uniform Commercial Code*

##### (1) Prevalence of Rules and Fact-Sensitive Standards

The Uniform Commercial Code is sensitive to facts and contexts by both employing many rules and being sensitive to different factual contexts. The following discussion will examine the first dimension of fact-sensitivity versus abstraction: whether a code uses rules or standards.

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155. *See infra* at text accompanying notes 372-73, 386.

156. *See, e.g.*, Osborne v. Osborne, 428 N.E.2d 810 (Mass. 1981).

157. Rosenberg v. Lipnick, 389 N.E.2d 385, 387-88 (Mass. 1979).

158. Even the French Code occasionally recognizes the significance of different factual contexts—as exemplified, for instance, by the French Code's distinction between nominate and innominate contracts, which provides different rules for the contracts of sale and hire. Nicholas, *supra* note 25, at 18.

While commentators have given much attention to those sections of the U.C.C. employing broad standards,[159] the bulk of the U.C.C. provisions constitute rules rather than standards.[160] Furthermore, to the extent standards are present in the U.C.C., they are more prevalent in Article 2 than in the other U.C.C. Articles. Because nearly all literature examining the U.C.C.'s use of standards has focussed on Article 2,[161]

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159. *See, e.g.*, Richard Danzig, *A Comment on the Jurisprudence of the Uniform Commercial Code*, 27 STAN. L. REV. 621 (1975) ("Article II is rife with . . . open-ended words, . . . generalized guides . . . and open-ended terms . . . . [It has a] scarcity of provisions explicit enough to be applied without a consideration of circumstance."). U.C.C. provisions employing standards include: U.C.C. § 2-204 ("Formation in General . . . . A contract for sale of goods may be made in any manner sufficient to show agreement . . . ."); *id.* § 2-207 ("Additional Terms in Acceptance or Confirmation . . . . A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance . . . ."); *id.* § 1-204 ("What is a reasonable time for taking any action depends on the nature, purpose and circumstances of such action.").

160. For example, U.C.C. § 2-313 dealing with "Express Warranties by Affirmation, Promise, Description, Sample," does not merely reiterate in a standard-like fashion the core principle that "the whole purpose of the law of warranty is to determine what it is that the seller has in essence agreed to sell." Instead, U.C.C. § 2-313 refers to concrete facts to communicate its rule. *Id.* ("(1) Express warranties by the seller are created as follows: (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods . . . (b) Any description of the goods . . . (c) Any sample or model which is made part of the basis of the bargain."); *see also id.* § 2-320 (explaining sellers' responsibilities under C.I.F. contracts, not merely giving standard-like principle that "the C.I.F. contract is not a destination but a shipment contract with risk of subsequent loss or damage to the goods passing to the buyer" but specifying that seller must: "(a) put the goods into the possession of a carrier at the port for shipment and obtain a negotiable bill or bills of lading covering the entire transportation to the named destination; and (b) load the goods and obtain a receipt from the carrier (which may be contained in the bill of lading) showing that the freight has been paid or provided for; and (c) obtain a policy or certificate of insurance, including any war risk insurance, of a kind and on terms then current at the port of shipment in the usual amount . . . ."); *id.* §§ 2-319 to 2-322 (detailing specific responsibilities under F.O.B. (free on board), F.A.S. (free along side), and C. & F. (cost and freight) contracts); *id.* §§ 2-308, 2-314, 2-316, 2-323, 2-324, 2-325, 2-327, 2-328; *cf.* Baird & Weisberg, *supra* note 134 (criticizing commentators for exaggerating Article 2's reliance on standards rather than rules).

161. The disproportionate attention that has been paid to Article 2's standards can be explained by the fact that the standard-employing provisions lend themselves to scholarly treatment, as the open-endedness that defines standards leads to greater variance in these provisions' applications than in the applications of U.C.C. provisions that use rules. The disproportionate attention given standards also is derivative of the disproportionate attention given to Article 2; fewer standards and a greater concentration of rules are found in the other U.C.C. articles. The great amount of scholarly attention given to Article 2 might be attributable to the fact that more people study and teach contracts—since it is a standard part of the law school curriculum—than the law governing secured transactions, promissory notes, and warehouse receipts.

the scholarly attention given to standards has exaggerated the role of standards in the U.C.C. as a whole.

Moreover, even where standards are employed in Article 2, the standards are tightly linked to specific facts. Thus, although U.C.C. provisions 2-202 (Parol Evidence rule), 2-205 (Firm Offers), 2-207 (Additional Terms) and 2-209 (Modification) all use standard-like language, they each provide guidance—albeit standard-like, open-ended direction—for discrete factual contexts. The law is thus tied to facts to a far greater extent than in the French *Code Civil*, which contains standard-like, abstract language but gives far less guidance, merely providing that the scope of a party's contractual obligation is a function of consent.[162]

(2) Significance of Context

The Uniform Commercial Code is also sensitive to the significance of differing contexts' impact on the appropriate rule,[163] the second aspect of sensitivity to facts. Most illustrative of this is that Article 2 of the U.C.C. does not provide the rules for "general" contract law, but only for a subset thereof, specifically, sales of goods. The remaining U.C.C. articles deal with other types of contracts, such as leases (Article 2A) and securities contracts (Article 9). Similarly, Article 7 does not detail broadly applicable principles of the law of bailee, but rather recites the law governing warehouse receipts.

Further, Article 2 of the U.C.C. explicitly distinguishes between merchants and nonmerchants with respect to many rules.[164] Similarly, the problem of unequal bargaining is dealt with differently across the various Articles of the U.C.C.; whereas section 2-302 grants the court the discretion to reform or strike "unconscionable" provisions appearing in sales of goods contracts, Articles 4 and 7 prohibit only a narrower group

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162. *See supra* note 142.

163. *See* PERMANENT EDITORIAL BOARD, *supra* note 133.

164. *See, e.g.*, U.C.C. § 2-205 (stating that the obligation of a firm offer applies only to merchants); *id.* § 2-207 (providing that, with regard to the so-called "battle of the forms," terms additional to or different from the offer in general will be construed as part of the contract if the offeror does not object to offeree's changes, but only if the offeree is a merchant); *id.* §§ 1-203, 1-201(19), 2-103(1)(b) (imposing an obligation of good faith on all U.C.C. transactions, but defining the obligation of good faith differently for nonmerchants and merchants. For nonmerchants, good faith is "honesty in fact in the conduct or transaction concerned," *id.* § 1-201(19), and for merchants, good faith is "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade," *id.* § 2-103(1)(b).). *See generally* PERMANENT EDITORIAL BOARD, *supra* note 133, at 14.

of contractual clauses in sections 4-103[165] and 7-204.[166] In addition, many of the U.C.C. sections do not abstractly describe the policies underlying the law, but bid the legalists to make context-specific inquiries to infer the rules implicit in each situation.[167] These examples are paradigmatic illustrations of law as a function of context.[168]

As noted above,[169] the U.C.C. includes its share of standard-like, abstract terms. Section 2-204, the general provision determining when contract obligations have been created, simply provides that a contract will be found where there is evidence that the parties have come to an

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165. That section reads as follows: "The effect of the provisions of this Article may be varied by agreement, but the parties to the agreement *cannot disclaim a bank's responsibility for its lack of good faith or failure to exercise ordinary care or limit the measure of damages for the lack or failure.*" U.C.C. § 7-204 (emphasis added).

166. Rudolf B. Schlesinger, *The Uniform Commercial Code in the Light of Comparative Law*, 1 INTER-AM. L. REV. 11, 32-33 (1959).

167. *See, e.g.*, U.C.C. § 1-204(2) (providing that "What is reasonable time for taking any action depends on the nature, purpose and circumstances of such action."); *id.* § 1-205 (stating that "A usage of trade is any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question."); Danzig, *supra* note 159, at 626 (arguing that "Article 1l of the Code can profitably be viewed as adapting the philosophy of 'immanent law' to a specific context . . . . The law is found . . . in directed exploration of the 'fact-pattern of common life.'").

168. A further illustration of the U.C.C.'s sensitivity to different contexts can be found in Article 2A, which deals specifically with the leasing of personal property. The very fact that leasing is addressed by a specific sub-Article and is not subsumed under general Article 2 contract provisions is indicative of context-sensitivity. The Foreword to the 1987 draft of Article 2A makes such sensitivity explicit:

> The legal rules and concepts derived from . . . common law principles relating to personal property, principles relating to real estate lease, and Articles 2 and 9 of the Uniform Commercial Code . . . . imperfectly fit a transaction that involves personal property rather than realty, and a lease rather than either a sale or a security interest as such.

U.C.C. § 2A-101 official comment (Tentative Draft 1987) (now codified). Noting that Article 2A "borrows from both Articles 2 and 9," the official comment continues by referencing the different contexts in which Articles 2 and 9 generally operate:

> Article 2 is predicated upon certain assumptions: Parties to the sales transaction frequently are without counsel; the agreement of the parties often is oral or evidenced by scant writings; obligations between the parties are bilateral; applicable law is influenced by the need to preserve freedom of contract . . . . Article 9 is predicated upon very different assumptions: Parties to a secured transaction regularly are represented by counsel; the agreement of the parties frequently is reduced to a writing, extensive in scope; the obligation between the parties are essentially unilateral; and applicable law seriously limits freedom of contract.

*Id.* § 2A-101 official comment. Leasing occurs under yet different circumstances, continues the official comment, requiring its own rules. *Id.*

169. *See supra* part III.A.2.a.

"agreement." Similarly, section 2-302 empowers courts to modify a contract or clause that was "unconscionable at the time it was made." The term "unconscionable" is not defined in the Code.

As will be seen with respect to the Federal Rules of Evidence, the use of standards in American law as a general matter leads courts to look to pre-code caselaw. This characteristic approach taken by American courts when confronted with such abstract terms was presaged by the official comment to section 2-302 of the Uniform Commercial Code. The comment notes that the "underlying basis of this section is illustrated by the results in cases such as the following" and proceeds to elaborate the holdings of ten cases. It should be noted that there were alternatives to citing to pre-code caselaw. The comment could have instructed courts to elucidate the meaning of unconscionability on their own, as a wholly new requirement of law. After all, unconscionability *had not previously been* a legal basis for striking a contract.[170] Another option would have been for the drafters to articulate their understanding of the proper contours of the doctrine of unconscionability.

*b. Federal Rules of Evidence*

(1) Prevalence of Standards

The Federal Rules of Evidence enunciate standards,[171] as indicated by the very structure of the Code. Whereas Wigmore's treatise on evidence occupies ten volumes, the Federal Rules of Evidence take only about thirty pages to exhaust the subject.[172] How was such an enormous compression possible? The answer is that the drafters of the evidence Code eschewed reference to various factual predicates and context and instead expressed the Code's rules by referring directly to the

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170. *See* U.C.C. § 2-302 official comment ("This section is intended to make it possible for the courts to police explicitly against the contracts or clauses which they find to be unconscionable. *In the past* such policing has been accomplished by adverse construction of language, by manipulation of the rules of offer and acceptance or by determinations that the clause is contrary to public policy or to the dominant purpose of the contract.") (emphasis added).

171. *See* Margaret A. Berger, *The Federal Rules of Evidence: Defining and Refining the Goals of Codification*, 12 HOFSTRA L. REV. 255, 255 (1984) (noting that most of the Federal Rules of Evidence "set forth general principles or standards rather than inflexible rules of law"); Thomas M. Mengler, *The Theory of Discretion in the Federal Rules of Evidence*, 74 IOWA L. REV. 413 (1989); *cf.* WIGMORE, *supra* note 36, § 6.5, at 451 (noting "the relative succinctness, and the consequent generality" of the Federal Rules of Evidence).

172. *See* Jon R. Waltz, *Judicial Discretion in the Admission of Evidence Under the Federal Rules of Evidence*, 79 NW. U. L. REV. 1097, 1097-98 (1984).

core principles animating evidentiary law. Thus, under the Rules, "all relevant evidence is admissible"[173] unless "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury"[174] or unless it falls into one of nine recurring situations.[175] Similarly, many of the rules are triggered only if "fairness" or the "interests of justice" so demand.[176] Abstract terms as these, that merely restate the undergirding policy, are paradigmatic standards, essentially asking the courts to look to the entirety of the factual record and to make their own determinations. By merely stating the ultimate goals—admitting relevant evidence, avoiding prejudice, and doing as justice or fairness so demands—the "doctrinal statement" embodied in the language of the Rules becomes quite pithy.

The abstract formulations in the Federal Rules of Evidence have led American courts to turn to pre-Code legal materials to concretize their application in specific contexts.[177] The case of *United States v. Beechum*[178] exemplifies this. That case involved the interpretation of Rule 404(b), which provides that "[e]vidence of other . . . acts . . . may . . . be admissible for other purposes" than proving the character of a person to show that they "acted in conformity therewith."[179] The *Beechum* court reasonably translated this language into a requirement that "the extrinsic evidence is relevant to an issue other than the defendant's character."[180] That, however, did not end the inquiry. The court had to determine what the abstract term "relevant" meant with respect to the particular context, which the court found to be characterized by two unique qualities: the (1) attempt to prove intent by (2) admitting extrinsic evidence. The court relied on pre-Code legal materials to decide how the legal concept of "relevance" applied to extrinsic evidence adduced to

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173. FED. R. EVID. 402.

174. FED. R. EVID. 403.

175. *See generally* FED. R. EVID. 404 to 412. A notable exception to the Federal Rules of Evidence's tendency towards the abstract is the laundry-list of hearsay exceptions enumerated in Rule 803, which are quite fact-specific.

176. *See* FED. R. EVID. 612(2) (authorizing court to allow witness to use a writing to refresh memory before testing if necessary in the "interests of justice"); FED. R. EVID. 106 (allowing party to require introduction of part of a writing or recorded statement if it "ought in fairness to be considered contemporaneously with" other admitted evidence); FED. R. EVID. 803(24) (allowing admission of unenumerated types of hearsay evidence if, among other things, the "interests of justice will best be served"); FED. R. EVID. 804(b)(5) (same as in Rule 803(24)).

177. *See* WIGMORE, *supra* note 36, at 451 ("[T]he very generality of many of the provisions of the Rules [of Evidence] requires extensive elaboration of the meaning of those Rules through adjudication.").

178. 582 F.2d 898 (5th Cir. 1978), *cert. denied*, 440 U.S. 920 (1979).

179. FED. R. EVID. 404(b).

180. *Beechum*, 582 F.2d at 911.

prove intent.[181] As will be reported later in the Article, Part II's study demonstrates that courts have relied on pre-Code legal materials to a significant extent in order to concretize the Code's abstract formulations.[182]

Courts also concretize the abstract Code rules by consulting post-Code cases. For example, Rule 609(a)(1) allows prior felony convictions into evidence to attack a witness's credibility if the "court determines that the probative value of admitting this evidence outweighs its prejudicial effect."[183] This abstract formulation of "probative value outweighing prejudice" was "concretized" in the Rule 609(a) context in *United States v. Mahone*.[184] That court translated Rule 609(a)(1)'s abstract formulation into a five-factor test[185] that has been relied upon by subsequent courts.[186]

(2) Indifference to Different Contexts

Accompanying the Federal Rules of Evidence's use of standards is indifference to the substantive legal context in which the evidentiary rules function.[187] Only one provision in the Federal Rules explicitly permits the judge to vary evidentiary requirements in light of the challenges implicit in a particular type of litigation.[188] The Rules instead are to be generally applicable for all cases "in the courts of the United States and before United States bankruptcy judges and United States

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181. The *Beechum* court relied on a 1933 article from the *Harvard Law Review* and the pre-Code case of Weiss v. United States, 122 F.2d 675 (5th Cir. 1941), to concretize Rule 404(b)'s application to the context at hand.

182. *See supra* notes 192-95 and accompanying text.

183. FED. R. EVID. 609(a)(1).

184. 537 F.2d 922 (7th Cir.), *cert. denied*, 429 U.S. 1025 (1976).

185. *Id.* at 929 (citing Gordon v. United States, 383 F.2d 936, 940 (D.C. Cir. 1967)). Those factors are: (1) the impeachment value of the prior crime; (2) the point in time of the conviction and the witness's subsequent history; (3) the similarity between the past crime and the charged crime; (4) the importance of the defendant's testimony; and (5) the centrality of the credibility issue.

186. *See, e.g.*, United States v. Paige, 464 F. Supp. 99 (E.D. Pa. 1978).

187. *See supra* text accompanying notes 150-58.

188. *See* FED. R. EVID. 412. Apart from the context of rape, however, the Rules do not directly grant courts discretion to tailor the Rules to different types of litigation.

magistrates."[189] Attempts to adapt evidentiary rules to the exigencies of specific types of litigations have been rebuffed.[190]

That is not to say that the Rules' discretion grants do not permit the judge to accommodate the rules to some discrete needs that correlate to particular types of litigations.[191] The accommodations afforded by general Code provisions, however, are incomplete. Unasked (or already decided) is whether the evidentiary challenges inherent in different types of cases merit specific evidentiary rules. The Federal Rules of Evidence are a paradigm of transubstantive rules that are applicable across the near-entirety of the litigation landscape.

*c. The Study's Findings*

As postulated earlier,[192] a statute's use of standards and disregard of context can be expected to produce reliance on extra-code materials to concretize the abstractions' appropriate application. This Article's comparative study of how courts interpret the U.C.C. and the Federal Rules of Evidence supports the hypotheses connected to this theory.[193] One hypothesis was that codes' use of standards would encourage greater reliance on pre-code materials to concretize the applicable rule.[194] As predicted, there was significantly greater court reliance on pre-code materials when interpreting the Federal Rules of Evidence than when

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189. FED. R. EVID. 101. *But see* FED. R. EVID. 1101 (stating that the "rules apply to the extent that matters of evidence are not provided for in the statutes which govern procedure therein" and enumerating about a dozen specific contexts where deviation from the Federal Rules is appropriate due to prior legislative specification).

190. In *Zenith Radio Corp. v. Matsushita*, the court dismissed plaintiffs' reliance on a pre-Code case that held that "'[b]road discretion and great latitude are permitted in the reception of evidence in conspiracy cases . . . . Exaggerated and over-refined niceties in the rules of evidence must give way to the broad terms [of another rule] if full effect of the anti-trust laws is to be given.'" 505 F. Supp. 1125, 1142 (E.D. Pa. 1980) (quoting United States v. General Elec. Co., 82 F. Supp. 753, 903 (D.N.J. 1949)). The *Zenith* court responded by "not[ing] only that these opinions preceded the Federal Rules of Evidence by many years and that *we have found nothing in the Rules themselves to indicate that they are to be applied less (or more) stringently in antitrust cases.*" *Id.* (emphasis added).

191. For example, the *Zenith* court found that considerations of undue delay and waste of time (FED. R. EVID. 403) alone would support refusal to allow into evidence a significant number of documents alleged to demonstrate dumping, a matter at issue in that case. *Zenith*, 505 F. Supp. at 1161. Undue delay and waste of time were particularly significant considerations due to the anticipated length of the trial (twelve months), which is characteristic of antitrust cases.

192. *See supra* text accompanying notes 143-45.

193. *See supra* parts II.C.1, II.C.2 (Figures 1 and 2).

194. *See supra* parts II.C.1, II.C.2 (Figures 1 and 2).

interpreting the U.C.C. Of the 148 issues examined during the first fifty U.C.C. cases, references were made to ninety-four pre-code cases and nine pre-code treatises. By contrast, the 126 evidentiary issues examined in the early Federal Rules of Evidence cases were resolved by reference to 157 pre-code cases and forty pre-code treatises. This represents a statistically significant difference between the U.C.C. and the Federal Rules of Evidence with respect to the extent to which judges resolved issues without consulting extra-code materials.[195]

The bulk of the differences between the two codes in the extent of extra-code materials relied upon is accounted for by the greater frequency with which extra-code materials were used for purposes of concretizing the Federal Rules of Evidence. Of the 338 issues appearing in the 100 U.C.C. cases, concretization was relied upon in sixty-three instances to clarify the legal rule. By contrast, concretization was employed in 105 instances during the courts' elaborations of the 319 issues (nineteen fewer issues than in UCC cases) appearing in the 100 Federal Rules of Evidence cases examined. Courts thus utilized extra-code materials to perform concretization with 32.9%[196] of the evidentiary issues and only 18.6%[197] of the U.C.C. issues.

This pattern of courts' greater reliance on extra-code materials for concretizing evidentiary issues is even more marked among the later code cases, which are the more accurate gauge of courts' reliance on concretization for codes using new rules and terminology, such as the U.C.C. and the Federal Rules of Evidence.[198] Among the later cases, courts employed concretization forty-one times to resolve 190 U.C.C. issues and eighty times to resolve 193 evidentiary questions. In other words, 21.6% of the times that the U.C.C. was interpreted courts cited

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195. *See supra* note 109. Sixty-one and one-half percent of the early U.C.C. issues were resolved without consulting extra-code materials. Standard deviation 4.0%; plus or minus 5.13% to an 80% confidence range. *See supra* note 78. By contrast, only 43.7% of evidentiary questions were answered without resort to extra-code materials. In the aggregate, 46.7% of the U.C.C. issues were resolved solely by reference to the text of the code, as compared to only 34.5% of issues in the Federal Rules of Evidence. (There is at least a 95% confidence range that the two means are statistically different, and an 80% confidence range that there is at least a 7.3% difference between the two means).

196. Standard deviation 2.6%; plus or minus 3.4% to an 80% confidence range. *See supra* note 78.

197. Standard deviation 2.1%; plus or minus 2.7% to an 80% confidence range. *See supra* note 78.

198. Later cases are a more accurate measure of court reliance on "concretization" because immediately after enactment of the code there are few appropriate caselaw materials to which courts can cite to concretize the meaning of new terminology.

to caselaw for purposes of concretization.[199] By contrast, courts relied on concretization a full 41.5% of the times they examined evidentiary issues.[200] Once again, these findings are consistent with the earlier observation that the U.C.C. is more sensitive to factual particulars than are the Federal Rules of Evidence.

### *B. Rules of Construction*

Perhaps the core variables affecting codification's impact on legal practice are the rules of construction provided by the codes themselves.[201] They fall into three general categories: (1) norms assigning the interpretive weight accorded to pre-code legal materials; (2) rules dealing with the role played by equitable considerations, which empower the judiciary to reach conclusions in particular cases in derogation of the strict code law; and (3) rules determining whether the codification is to be the law's final statement or that instead invite the judiciary to help further advance the law.

#### 1. THE CODE'S RELATIONSHIP TO PRIOR COMMON LAW

The first variable determinative of the codes' impact on legal practice is the relationship the codes are deemed to bear to the pre-code law. There is no *a priori* jurisprudentially correct relationship between the codes and the pre-code materials,[202] and the actual relationship often is a byproduct of extra-legal factors. The political aspirations of breaking with prior regimes and unifying disparate provinces into a single national unit probably explain why the code became the sole source of law in France and Germany, wholly superseding pre-code law.[203] In the United States, by contrast, where codifications have not been the tail of a revolutionary dog, there has not been the same adamancy to cast aside pre-code legal materials.

American codes generally adopt one of two different forms of self-consciousness with regard to their relationship to pre-code materials. The

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199. Standard deviation 3.0%; plus or minus 3.8% to an 80% confidence range. *See supra* note 78.

200. Standard deviation 3.5%; plus or minus 4.5% to an 80% confidence range. *See supra* note 78.

201. A background query that receives some attention *infra* part III.B.2.a and following, but that merits additional study, is whether American judges pay heed to the different rules of construction articulated in the codifications, or whether they approach all codes in a similar way.

202. *See, e.g.*, *supra* part I.A.3.

203. *See supra* note 23.

first, characterized by the Federal Rules of Evidence, views itself as the culmination of the pre-code materials. Sometimes, it is true, this requires alteration of a "bad" common law rule.[204] For the most part, though, the evidence Code sees itself as making the choice among several common law rules or merely clearly stating "the" common law rule. This is evidenced by the Advisory Committee's notes, nearly all of which refer explicitly to pre-Code caselaw and pre-Code scholarly articles to clarify the scope of the Code's evidentiary rules. Caselaw hermeneutics of the Federal Rules of Evidence also show the Rules to be an outgrowth of the pre-Code legal materials; ascertaining the intent and scope of the Rules frequently is accomplished by referring to the pre-Code caselaw.[205] The 126 early Federal Rules of Evidence issues examined in the study were disposed of by 157 references to pre-Code cases and forty references to pre-Code articles and treatises.[206]

In practice, however, there is imperfect consonance between the Federal Rules of Evidence and the pre-Code rules. This is because all codes adopt an overarching approach to the law they codify that seasons the taste of all the rules' applications[207]—an approach that is not necessarily identical to that taken by the pre-code line of cases that is the precursor of the code's rule. For example, the *general* orientation of the Federal Rules of Evidence is toward the admissibility of evidence: unless otherwise provided, all relevant evidence is admissible.[208] "Relevance" is broadly defined under Rule 401 as having "any tendency" to make a material proposition "more" or "less" probable.[209] This contrasts with stricter tests of relevancy that were set forth by some pre-Code cases.[210] When the Code rules that are derived from pre-Code cases are read in conjunction with Rule 401's admissibility orientation, the outcome may deviate from what the pre-Code cases suggest.[211] Judicial development of the post-Rules law takes place in the hybrid soil of the Code and the pre-Code legal materials.

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204. *See supra* note 57.

205. *See, e.g.*, United States v. Beechum, 582 F.2d 898 (1978) (discussed *supra* notes 127, 178-81).

206. *See supra* part II.C.1 (Figure 1).

207. *See infra* part IV.

208. FED. R. EVID. 402.

209. *See* Conway v. Chemical Leaman Tank Lines Inc., 525 F.2d 927, 1 Fed. R. Evid. Serv. (Callaghan) 193, 196 (5th Cir. 1976) ("The policy of the new Rules is one of broad admissibility."); ROTHSTEIN, *supra* note 56, at 17.

210. *See, e.g.*, Standafer v. First Nat'l Bank, 52 N.W.2d 718 (Minn. 1952); Engel v. United Traction Co., 96 N.E. 731 (N.Y. 1911).

211. *See infra* part IV.C.1.c.(1) (discussing the impact of the Uniform Commercial Code's Agreement approach on the doctrine of promissory estoppel).

The second form of contemporary American code self-consciousness is that of breaking from pre-code archaic law. This can be seen in the Uniform Commercial Code, which proclaims itself "a complete revision and modernization of the Uniform Sales Act,"[212] the pre-U.C.C. law. Consequently, the Code was to become the starting point for the development of the law.[213] This is reflected in the dominant interpretive approach found with the Uniform Commercial Code, which consulted relatively few pre-U.C.C. materials.[214]

Nonetheless, the U.C.C. is not dogmatically opposed to utilizing pre-Code law. Those pre-Code concepts that the U.C.C. largely adopts are referred to by the cases or scholarly articles that are their source.[215] Terms are defined by reference to pre-Code materials,[216] and, perhaps most significantly, section 1-103 forthrightly supplements the Code's provisions with the pre-Code "principles of law and equity" unless particularly displaced by the Code provisions,[217] generating a not insubstantial legal continuity with the past.[218]

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212. U.C.C. § 2-101 official comment; *see also* UNIF. RESIDENTIAL LANDLORD AND TENANT ACT.

213. This corresponds with the second approach to code interpretation articulated by Story et al., *supra* note 31, under the Perpetual Index model of codification.

214. In contrast to the frequency with which the Federal Rules of Evidence were interpreted by referenee to pre-code legal materials, *see supra* notes 194-95, the 148 issues found in the early U.C.C. cases were disposed of by only 94 references to pre-code cases and nine references to pre-code articles and treatises. *See infra* part III.A.2.c.

215. *See, e.g.*, U.C.C. § 1-105 official comment 1 ("In general, the test of 'reasonable relation' [found in 1-105] is similar to that laid down by the Supreme Court in Seeman v. Philadelphia Warehouse Co., 274 U.S. 403 (1927).").

216. *See, e.g.*, U.C.C. § 1-201 official comment (regarding the definition of security interest, the comment states "reference to the case law prior to this Act will provide a useful source of precedent").

217. The Statutory Rule Against Perpetuities shares the U.C.C.'s aspirations of significantly reforming the law that came before it. There too, subsidiary common law doctrines not explicitly overruled by the Act continue. *See, e.g.*, 8A UNIF. LAWS ANNOTATED 351 (Supp. 1992) ("The courts in interpreting the Common-law Rule developed several subsidiary doctrines. In accordance with the general principle of statutory construction that statutes in derogation of the common law are to be construed narrowly, a subsidiary doctrine is superseded by this Act only to the extent the provisions of the Act conflict with it.").

218. It remains to be seen, however, to what extent the dominant approach adopted by the code colors post-Code legalists' views of the pre-Code doctrines. That work remains to be done in a future paper.

### 2. PROVISIONS PERMITTING EQUITABLE ADJUSTMENTS

One of the early arguments against codifying the common law was that codification would rob judges of the necessary discretion to do justice in the particular case.[219] The hollowness of this argument is patent: there is no reason why codes could not incorporate provisions granting judges the discretion to make equitable adjustments where necessary.[220] It was only under the earliest approach to interpretation of codes, where a judge's discretion was deemed to be apostasy,[221] that the concept of such a provision was unthinkable.

Nearly all recent American codifications have granted discretion to the courts to vary the codes' strict rules. Analysis uncovers three different types of discretion grants: provisions allowing complete equitable discretion, those incorporating pre-code equitable doctrines that have been rulified, and purposes provisions. Most of these provisions apply across the entirety of the code, while others are applicable only to particular parts of the code.

#### *a. Different Types of Equitable Grants in the Various Codes*

The broadest type of discretion grant is exemplified by section 19 of the Uniform Trusts Act and section 5 of the Uniform Trustee's Powers Act.[222] Section 19 of the Uniform Trusts Act permits a court, in its judgment, to suspend all the legal obligations set forth in the Act.[223]

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219. *See supra* note 4 and accompanying text.

220. *See supra* text accompanying notes 148-49.

221. *See supra* part I.A.1.

222. By using the term "comprehensive" equitable discretion, I do not mean to suggest that an appellate court would be wholly without power to reverse a trial court's decision based on this equitable provision. *But cf.* Waltz, *supra* note 172, at 1103 (arguing guided decisonmaking must adhere to certain guidelines). Instead, I mean that the provision grants trial judges full, uncontrolled discretion to take into account and balance any factors as they see fit. Certainly, appellate review would be extremely deferential. Reversal still would be possible, for example, if it seemed that unsavory motivations lurked behind the decision, or if the guiding policy identified by the judge was at fundamental odds with the goals of that doctrinal area.

223. Section 19 provides:

> A court of competent jurisdiction may, for cause shown and upon notice to the beneficiaries, relieve a trustee from any or all of the duties and restrictions which would otherwise be placed upon him by this Act, or wholly or partly excuse a trustee who has acted honestly and reasonably from liability for violations of the provisions of this Act.

UNIF. TRUSTS ACT § 19 (1937). The language of Section 5 of the Uniform Trustee's Powers Act is almost identical:

The Court's equitable powers under Section 19 of the Uniform Trusts Act exceed even the powers held by beneficiaries to remove duties, restrictions, and liabilities from trustees.[224] These equitable provisions have been utilized by the courts.[225]

A second form of equitable discretion is found in some codes in the form of equitable grants in specific rules. This contrasts with the grant in Section 19 of the Uniform Trusts Act, which is applicable across all the Code's provisions. The Federal Rules of Evidence exemplifies this second form of broad equitable discretion. Many provisions in the Federal Rules of Evidence contain explicit authorizations that allow courts to sidestep the rule if application "would be unfair" or if avoidance is otherwise necessary "in the exercise of [the court's] discretion."[226] These discretionary phrases have been widely relied upon by courts.[227]

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> This Act does not affect the power of a court of competent jurisdiction for cause shown and upon petition of the trustee or affected beneficiary and upon appropriate notice to the affected parties to relieve a trustee from any restrictions on his power that would otherwise be placed upon him by the trust or by this Act.

UNIF. TRUSTEE'S POWERS ACT § 5(a) (1964).

224. Section 18 of the Uniform Trusts Act prohibits trustees from removing the "duties, restrictions, and liabilities imposed by" three sections of the Act.

225. Courts have relied on Section 19 to apply their equitable powers to allow termination of trusts prior to the time explicitly fixed by the trust instrument, *see, e.g.*, Ambrose v. First Nat'l Bank, 482 P.2d 828 (Nev. 1971), to sell trust property in violation of the trust agreement, *see, e.g.*, Carroll v. Carroll, 464 S.W.2d 440 (Tex. Ct. App. 1971), and to allow the trustee to purchase property from the trust, in violation of Section 5 of the Uniform Trusts Act, *see, e.g.*, Wachovia Bank & Trust Co. v. Johnston, 153 S.E.2d 449 (N.C. 1967). A provision nearly identical to Section 19 was relied on by another court to allow a trustee both to purchase property from the trust and to lend money to the trust and then to utilize those funds to purchase notes from another related trust that it administered. *See* Burnett v. First Nat'l Bank, 567 S.W.2d 873 (Tex. Ct. App. 1978).

226. *See, e.g.*, FED. R. EVID. 403 (authorizing trial judge to disallow relevant evidence if "its probative value is substantially outweighed by the danger of unfair prejudice"); FED. R. EVID. 609 (not allowing admission of conviction of crime for impeachment purposes if ten years have elapsed "unless the court determines, in the interests of justice" that the probative value outweighs its prejudicial effect); FED. R. EVID. 611(b) (limiting cross-examination to the subject matter of the prior direct examination unless the trial judge determines otherwise "in the exercise of discretion"); FED. R. EVID. 1003 (allowing a duplicate to be admitted unless "in the circumstances it would be unfair to admit the duplicate in lieu of the original"). *See generally* Waltz, *supra* note 172, at 1104-17.

227. The bulk of court reliance on these discretionary provisions is impossible to document. Exercise of discretion will not be apparent from jury instructions or the jury verdict. Nor will it be discussed in the course of most court opinions in the case of nonjury trials. And, in all likelihood, most exercises of discretion are not appealed.

It should be noted that these provisions are similar to, but distinct from, many of the standards found throughout the Federal Rules of Evidence.[228] The similarity is that both call for the court's active involvement. But whereas the open-ended standards define the operative legal dictate, the equitable discretion term allows a variance from the general rule.

The most common form of discretion-granting provision appearing in American codifications shrinks back from granting judges unfettered discretion to equitably do as they see fit when applying the code's rule would result in a distasteful outcome. Instead, this type of provision allows the judge access to an arsenal of alternative doctrines that are available, unless specific code provisions indicate these alternatives' inapplicability. While constraining the judge, the alternative doctrines generally permit a more palatable outcome than would be obtained if the dominant rule were applied in the particular instance.[229] This approach is exemplified by section 1-103 of the Uniform Commercial Code, which reads as follows:

> *Supplementary General Principles of Law Applicable.* Unless displaced by the particular provisions of this Act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions.[230]

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Notwithstanding the difficulties in empirically gauging the incidence of invoking discretionary grants, nearly all evidence scholars believe that trial courts rely frequently on the discretionary grants accorded by the Code (though there is dispute concerning the precise quantum). *See, e.g.*, JACK B. WEINSTEIN & MARGARET A. BERGER, 1 WEINSTEIN'S EVIDENCE, at iii-iv (1994); Waltz, *supra* note 172, at 1118-20 (arguing that the significant role of discretion under the Rules is not a change from common law); Faust Rossi, *The Silent Revolution*, LITIGATION, Winter 1983, at 13 (arguing that the Federal Rules of Evidence "bristle with language granting discretion to the trial judges" and that, as a result, the Code is "destroying many traditional barriers to proof"). For a list of cases in which the judges have invoked the various discretionary grants, see Waltz, *supra* note 176, at 1107 n.58 (collecting cases relying on the discretionary grants in FED. R. EVID. 608(b)); *id.* (FED. R. EVID. 612(2)); *id.* at 1110 n.75 (FED. R. EVID. 1003); *id.* at 1111 nn.78-79 (FED. R. EVID. 609(b)).

228. *See supra* part III.A.2.b.(1).

229. *See supra* part III.A.1.a.

230. U.C.C. § 1-103.

Similar provisions incorporating the "principles of law and equity . . . unless displaced by the particular provisions" appear in nearly every Uniform Act.[231]

Appearing in Article 1, section 1-103 is applicable to *all* sections of the U.C.C. Consistent with its mandate, section 1-103 has been invoked by courts and applied to all Articles, including Article 9.[232] Section 1-103's application to Article 9 is a testimony to the strength of these equitable principles. Article 9 addresses highly commercialized contexts in which parties generally are represented by counsel,[233] a situation where equitable principles would be expected to be abandoned first.

Courts generally find that the U.C.C. has not displaced the common law and equitable doctrines that are presumptively applicable under section 1-103.[234] This is not surprising, since few U.C.C. provisions *specifically* displace equitable doctrines. Scholarly commentary concluding that the pre-Code equitable principles should only infrequently be found to have been displaced by the Code has been relied on heavily

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231. *See, e.g.*, UNIF. SIMPLIFICATION OF LAND TRANSFERS ACT § 1-103 (1990) ("The principles of law and equity, including the law relative to capacity to contract, principal and agent, laches, marshalling of assets, subrogation, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause, supplement this Act unless displaced by particular provisions of it."); UNIF. RESIDENTIAL LANDLORD AND TENANT ACT § 1.103 ("Unless displaced by the provisions of this Act, the principles of law and equity, including the law relating to capacity to contract, mutuality of obligations, principal and agent, . . . fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause supplement its provisions."); MODEL REAL ESTATE COOP. ACT § 1-108 (1990) (almost identical); UNIFORM PROBATE CODE § 1-103 (1990) ("Unless displaced by the particular provisions of this Code, the principles of law and equity supplement its provisions.").

232. *See, e.g.*, Thompson v. United States, 408 F.2d 1075, 1084 (8th Cir. 1969) (holding that lack of good faith on part of secured creditor towards the United States government, a junior creditor, is a proper basis for altering Article 9 priorities); Limor Diamonds, Inc. v. D'Oro by Christopher Michael, Inc., 558 F. Supp. 709, 711-12 (S.D.N.Y. 1983) (finding that a secured party's rights in collateral may be subordinated to the rights of a holder of junior security interest based on lack of good faith); Citizens State Bank v. Peoples Bank, 475 N.E.2d 324, 327 (Ind. Ct. App. 1985) (using promissory estoppel principles to subordinate the lien of a senior creditor).

233. This is in stark contrast to Article 2 situations, which largely deal with contracts formed during the course of merchants' dealings, where counsel usually is not present (and, indeed, where the precise time of contract formation is often unclear). *See Introduction* to U.C.C. art. 2A.

234. *See, e.g.*, Delta Bank & Trust Co. v. Chisholm, 19 U.C.C. Rep. Serv. 2d (Callaghan) 514, 601 So. 2d 345 (La. Ct. App. 1992); First Valley Leasing, Inc. v. Goushy, 795 F. Supp. 693 (D.N.J. 1992); Syrovy v. Alpine Resources, Inc., 841 P.2d 1279, 19 U.C.C. Rep. Serv. 2d (Callaghan) 995, 1000 (Wash. Ct. App. 1992).

by courts.[235] A limited number of courts have eschewed a literal reading and followed a functional interpretation of "displaced by the particular provisions," finding displacement where the Code provision and equitable principle share common elements but assign differing burdens of proof.[236] Section 1-103 has been invoked in literally thousands of cases[237] and has been the subject of numerous scholarly articles,[238] further testimony to the post-Code strength of equity.

Other sections of the U.C.C. have the effect of granting courts limited discretion to make equitable derogations. Section 2-302 "Unconscionable Contract or Clause" empowers courts to "make a conclusion of law as to [the contract or particular provision's] unconscionability."[239] Section 2-302 provides that if "the contract or any clause of the contract [is found] to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause,

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235. *See* 1 JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 5, at 19-20 (3d ed. 1988 & Supp. 1994) ("Code sections do not 'occupy the equity field.' Rather, general equitable principles remain largely intact, for they are only rarely 'particularly displaced.'"); *see also* Adkinson v. International Harvester Co., 975 F.2d 208, 19 U.C.C. Rep. Serv. 2d (Callaghan) 126, 132 (5th Cir. 1992) (quoting these sources); Ninth Dist. Prod. Credit Ass'n v. Ed Duggan, Inc., 821 P.2d 788, 794-98 (Colo. 1991) (holding unjust enrichment allowed unsecured creditor to collect ahead of secured creditor, referencing § 1-103's limiting language and quoting Summer's article, which concludes that "general equitable principles . . . are only rarely 'particularly displaced'"); Robert S. Summers, *General Equitable Principles Under Section 1-103 of the Uniform Commercial Code*, 72 NW. U. L. REV. 906, 936 (1978).

236. *See* Equitable Life Assurance Soc'y v. Okey, 812 F.2d 906, 908-09 (4th Cir. 1987) (holding that U.C.C. conversion claim in § 3-419 displaces common law negligence although negligence is not specifically mentioned in § 3-420 due to "the overlapping nature of the two theories: while negligence and conversion both require inquiry as to whether there was payment over an unauthorized indorsement and evaluation of the reasonableness of the defendant's actions," each cause assigns different burdens for the element of due care); *see also* Berthot v. Security Pac. Bank, 823 P.2d 1326 (Ariz. Ct. App. 1991) (also finding that § 3-419 displaces common law action of negligence); Robinson v. Garcia, 804 S.W.2d 238, 246 (Tex. Ct. App.) (Section 1-207 displaces equitable doctrine of accord and satisfaction, despite absence of the explicit mention of such doctrine, because § 1-207's language of "performance" encompasses the term "payment" with respect to full-payment checks), *aff'd per curiam*, 817 S.W.2d 59 (Tex. 1991).

237. *See* 1 RONALD A. ANDERSON, ANDERSON ON THE UNIFORM COMMERCIAL CODE 64-107 (3d ed. 1981).

238. *See, e.g.*, Summers, *supra* note 235.

239. U.C.C. § 2-302 official comment.

or it may so limit the application of any unconscionable clause as to avoid any unconscionable result." This provision is frequently invoked.[240]

In like fashion, section 1-203 imposes the obligation of good faith on the performance and enforcement of all contracts and duties under the U.C.C.[241] When one party has breached its obligation of good faith, ordinary legal duties may be suspended by the court. This section also has been widely relied upon by courts.[242]

Perhaps the most explicit statement of the active role intended for courts can be found in part 1 of the official comment to section 1-102, which is applicable to the entirety of the U.C.C. Noting approvingly the way courts have interpreted statutes, the comment states that

> [courts] have . . . implemented a statutory policy with liberal and useful remedies not provided in the statutory text. They have disregarded a statutory limitation of remedy where the reason of the limitation did not apply . . . . *Nothing in this Act stands in the way of the continuance of such action by the courts.*[243]

Courts have used this language to justify applying U.C.C. law to contexts outside the U.C.C.'s technical jurisdiction.[244] No cases have been

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240. *See* UNIF. COMM. CODE Case Digest ¶ 2302 (182 pages of summaries from cases appealing to U.C.C. § 2-302).

241. U.C.C. § 1-203. That section reads as follows: "Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement."

242. Courts have been conscious, however, of section 1-203's limiting language, which makes good faith applicable only to *performance* or *enforcement* and *not* to bargaining and negotiation. *See, e.g.*, Baker v. Ratzloff, 564 P.2d 518 (Kan. Ct. App. 1977). *But see* Tipton v. Woodbury, 616 F.2d 170, 175 (5th Cir. 1980) (holding that what is a reasonable time for sending a letter confirming an oral contract is determined in light of the circumstances and in light of the duties of the parties to act in good faith). That U.C.C. § 1-203's limitations are generally observed has led some commentators to call for a change in its language. *See* Robert Summers, *"Good Faith" in General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 VA. L. REV. 195 (1968).

243. U.C.C. § 1-102 official comment (emphasis added).

244. These courts have relied on other language from this comment, which reads:

> "courts have recognized the policies embodied in an act as applicable in reason to subject-matter which was not expressly included in the language of the act . . . . They have done the same where reason and policy so required, even where the subject matter had been intentionally excluded from the act in general."

U.C.C. § 1-102 official comment (citations omitted); *see also* Semler v. Knowling, 325 N.W.2d 395, 397-99 (Iowa 1982) (relying on the comment's language to support applying Article 2's implied warranty of fitness for a particular purpose to a service contract falling outside of Article 2); *In re* N-Ren Corp., 773 P.2d 1059, 1071-73 (Okla. 1989) (relying

found, though, where this language has been relied upon for deviating from the Code rule. The official comment to section 1-102 thus is an as-of-yet unused source for equitable derogation.

*b. "Purposes" Provisions*

Courts also look to statements of the code's policy goals ("purposes" provisions) as a source of equitable powers to deviate from the code law. Most frequently, these purposes clauses supplement other provisions that incorporate principles of law and equity not explicitly displaced by the code. For example, the Uniform Probate Code's stated purpose of "mak[ing] effective the intent of a decedent in distribution of his property"[245] is perfectly consistent with a court's application of its equity powers[246] to rewrite portions of a will where following the written instrument is clearly problematic. In these instances, the purposes clauses are largely redundant.

The purposes clause in the Federal Rules of Evidence, by contrast, is an important source for equitable deviation. This is because the evidence Code, unlike most other codifications, lacks any of the aforementioned forms of discretionary grants. The purposes provision is found in Rule 102 of the evidence Code. The relevant part reads as follows: "*Purpose and Construction*: These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay."[247] Courts regularly have relied on this provision to justify deviating from the code's strict requirements.[248]

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on this language to apply Article 9 principles to the construction of a state nonpossessory lien statute that unquestionably fell outside of Article 9).

245. UNIF. PROBATE CODE § 1-102.

246. *Id.* § 1-103.

247. FED. R. EVID. 102. This is not to suggest that Rule 102 of the Federal Rules of Evidence is the exclusive provision upon which courts have relied to fashion equitable adjustments in particular cases. Various provisions have language that has been construed and relied upon for equitable adjustments. *See* Trammel v. United States, 445 U.S. 40, 47 (1980) (interpreting the purpose of FED. R. EVID. 501, which states that "the privilege of a witness . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience," as "'provid[ing] the courts with the flexibility to develop rules of privilege on a case-by-case basis'" (citation omitted)).

248. *See, e.g.*, United States v. Panzardi-Lespier, 918 F.2d 313, 317 (1st Cir. 1990) (allowing into evidence a hearsay statement not brought to defendant's attention before the start of the trial despite Rule 804(b)(5)'s notice requirement that "*a statement may not be admitted under this exception unless* the proponent of it makes known to the adverse party sufficiently *in advance of the trial or hearing*," (emphasis added) on the basis that a "flexible approach . . . is in harmony with both the interest of justice and the general purposes of the Rules of Evidence," citing to Rule 102); *In re* Japanese Electronic

One final word about equitable discretion under the Federal Rules of Evidence is in order. It must be recalled that the purposes provision in that Code functions in concert with two other factors that collectively determine the effective degree of equitable wiggle-room retained by courts. First are the discretion grants that can be found in particular rules.[249] Second, and most importantly, is the fact that the Code's edicts are formulated, for the most part, in terms of standards.[250] By expressing the Code's canons with reference to the ultimate policies, the very problem of over- and under-inclusiveness, which equitable derogation seeks to remedy, is to a large degree preempted.

*c. Conclusions*

To conclude, courts frequently have relied on code provisions granting them discretion to employ equitable doctrines[251] and to "secure fairness" and "eliminat[e] unjustifiable expense and delay."[252] These grants of equitable discretion have allowed courts to avoid mechanical application of the codes' rules where injustice would result. Concerns that codification would rob judges of the discretion necessary to "do justice" in the particular cases have not materialized.

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Products Antitrust Litigation, 723 F.2d 238, 288 (3d Cir. 1983) (deviating from Rule 803(6)'s requirement that records of regularly conducted activity be permitted into evidence only if "the custodian or other qualified witness" testifies as to four indicia of reliability because such a ruling is "consistent with the spirit of the Rules"), *rev'd sub nom.* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986); United States v. Opager, 589 F.2d 799, 802-03 (5th Cir. 1979); United States v. Batts, 558 F.2d 513, 517 (9th Cir.) ("We believe that the ultimate purpose of the rules of evidence should not be lost by a rigid, blind application of a single rule of evidence. Individual rules of evidence . . . should not be read in isolation, when to do so destroys the purpose of ascertaining the truth"), *withdrawn and aff'd on other grounds*, 573 F.2d 599 (1977), *cert. denied*, 439 U.S. 859 (1978); United States v. Blake, 941 F.2d 334, 339 (5th Cir. 1991), *cert. denied*, 113 S. Ct. 596 (1992) (quoting approvingly from *Batts* even though the "decision was subsequently withdrawn," because "the original *Batts* decision [was] persuasive, [and therefore] we do not reconsider its language").

249. *See supra* part III.B.2.a.

250. *See supra* part III.A.2.b.(1).

251. U.C.C. § 1-103.

252. FED. R. EVID. 102.

### 3. PROVISIONS INVITING THE JUDICIARY TO FURTHER DEVELOP CODIFIED LAW

Another determinant of the impact codes have on the law they codify is the presence of provisions empowering judges to continue to develop the codified bodies of law. Such provisions fit comfortably with the Perpetual Index model of codification.[253] The first sub-part will explore these provisions, particularly the way they have been utilized by courts applying the U.C.C. and the Federal Rules of Evidence. The second sub-part will examine codes that are without such provisions. The third sub-part explores the practical import of such invitations. The last sub-part explores codes' invitations to the legislatures to redraft the codes.

#### *a. The Invitations*

##### (1) The U.C.C.

Section 1-102 of the U.C.C., which applies to all U.C.C. articles, reads as follows:

> (1) This Act shall be liberally construed and applied to promote its underlying purposes and policies.
> (2) Underlying purposes and policies of this Act are
> (a) to simplify, clarify and modernize the law governing commercial transactions;
> (b) *to permit the continued expansion of commercial practices through custom, usage and agreement of parties.*[254]

The official comment on these two subsections states that

> This act is drawn to provide flexibility so that, since it is intended to be a semi-permanent piece of legislation, *it will provide its own machinery for expansion of commercial practices. It is intended to make it possible for the law embodied in this Act to be developed by the courts in the light of unforeseen and new circumstances and practices.*[255]

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253. *See supra* part I.A.3.

254. U.C.C. § 1-102 (emphasis added). In addition to U.C.C. § 1-102, several specific sections in the U.C.C. repeat the call for active judicial development. *See infra* p. 65.

255. *Id.* (emphasis added).

Section 1-102 has most frequently been used by courts to determine the applicable scope of the U.C.C.[256] Additionally, section 1-102 has been relied upon to effectuate emendations of the Code's text.[257]

The U.C.C.'s invitation for judges' participation in developing the law also can be found in particular Code sections. For example, section 2-716 "Buyer's Right to Specific Performance or Replevin" allows the court to order specific performance if the goods involved are "unique" or "*in other proper circumstances.*"[258] The terms and conditions that may be included in the court's order for specific performance may include "price, damages, *or other relief as the court may deem just.*" The comments to this section make clear that these phrases were intended to be invitations, noting that this section "seeks to further a more liberal attitude than some courts have shown in connection with the specific performance of contracts of sale."[259] Courts have followed the cue.[260]

The U.C.C.'s invitation to judges also can be found in the official comments to particular sections. For example, official comment 2 to section 2-313 "Express Warranties" states that

> [a]lthough this section is limited in its scope and direct purpose to warranties made by the seller to the buyer as part of a contract for sale, the warranty sections of this Article are not designed in any way to disturb those lines of case law growth which have recognized that warranties need not be confined . . . to the direct parties to such a contract . . . . [T]he matter is left to the case law with the intention that the policies of this

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256. *See, e.g.*, Advent Systems Ltd. v. Unisys Corp., 925 F.2d 670, 675-76 (3d Cir. 1991) (referencing U.C.C. § 1-102 as the predicate for explicit policy-oriented analysis of whether computer software qualifies as a "good" under Article 2).

257. *See, e.g.*, Kalamazoo Steel Process, Inc. v. H.O.U. Corp., 503 F.2d 1218, 1221, 1223 (6th Cir. 1974) (stating that although "the Code did not expressly provide that a secured party must refile" when a debtor changes its name, requiring refiling does not "involve impermissible judicial legislation" and quoting § 1-102 as justification); Garden & Turf Supply Corp. v. Strange, 440 N.E.2d 710, 715 (Ind. Ct. App. 1982) (acknowledging that the Code "requires the auctioneer to send the notice to creditors, not an agent," the court cited to § 1-102 as empowering it to give a "liberal construction of our commercial Code" and concluded that the notice requirement of U.C.C. § 6-107(3) was satisfied where notice had only been given to an agent).

258. U.C.C. § 2-716 (emphasis added).

259. *See* PERMANENT EDITORIAL BOARD, *supra* note 133, at 231 (noting and relying upon U.C.C. § 2-716(1)'s "invitation . . . to expand the scope of specific performance").

260. *See, e.g.*, Eastern Air Lines, Inc. v. Gulf Oil Corp., 415 F. Supp. 429 (S.D. Fla. 1975); Kaiser Trading Co. v. Associated Metals & Minerals Corp., 321 F. Supp. 923 (N.D. Cal. 1970), *appeal dismissed*, 443 F.2d 1364 (9th Cir. 1971).

> Act may offer useful guidance in dealing with further cases as they arise.[261]

Courts have responded to this invitation, forthrightly resolving on their own the question of whether and under what conditions privity should be a prerequisite for express warranties.[262]

(2) The Federal Rules of Evidence

The Federal Rules of Evidence provide an invitation to judges that is similar to U.C.C. section 1-102. Rule 102 of the evidence Code provides that "[t]hese rules sball be construed to secure . . . *promotion of growth and development of the law of evidence* to the end that the truth may be ascertained and proceedings justly determined."[263] In testimony during the hearings on the Proposed Rules of Evidence, the Reporter for the Advisory Committee of the Federal Rules of Evidence stated explicitly that Rule 102 was intended to allow "expansion [of the evidentiary rules] by analogy to cover new or unanticipated situations,"[264] a declaration that has been relied upon in at least one federal court opinion.[265] In short, Rule 102 is intended to "be read in connection with every provision of this title to afford life and growth of the law of evidence."[266]

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261. U.C.C. § 2-716 official comment.

262. *See* Whitaker v. Lian Feng Mach. Co., 509 N.E.2d 591 (Ill. App. Ct. 1987); Spiegel v. Sharp Elec. Corp., 466 N.E.2d 1040 (Ill. App. Ct. 1984), and cases cited therein.

263. FED. R. EVID. 102 (emphasis added).

264. *Rules of Evidence (Supplement): Hearings on Proposed Rules of Evidence Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 4 (1973) (statement of Professor Edward Cleary, reporter); *see also* 120 CONG. REC. 1413 (1974) (statement of Rep. Smith) ("I can foresee, for instance, in areas in which the codified rules of evidence may not cover, that there, as the new question occurs in a court, the judge of that court will make a rule to cover the occurrence . . . . It will be as it has been in the past, those rules have been subject to review by superior courts and finally will become to be the accepted and uniform rule at least to the extent the Supreme Court makes a final determination for the whole country. Otherwise, there may be some different rules in some different courts in regard to those positions which may not have been covered by the present law.").

265. *See* United States v. Bibbs, 564 F.2d 1165, 1169 n.2 (5th Cir. 1977), *cert. denied*, 435 U.S. 1007 (1978).

266. 1 WEINSTEIN & BERGER, *supra* note 227, at 102-15 (quoting WIS. STAT. ANN. § 901.02 judicial council committee's note (1994)). Some noted evidence scholars have argued that Rule 1102, which references the mechanism for legislative amendment of the Rules, *see* FED. R. EVID. 1102 ("Amendments to the Federal Rules of Evidence may be made as provided in section 2072 of title 28 of the United States Code."), forecloses judicial lawmaking, *see* 1 STEPHEN A. SALTZBURG & MICHAEL M. MARTIN, FEDERAL RULES OF EVIDENCE MANUAL 12 (5th ed. 1990) ("Whereas [Rule 102] states

Rule 102 is frequently cited in opinions to justify fashioning procedural additions to deal with situations not covered by the Rules.[267] Often the rules advanced by the court are derived by analogy from the Federal Rules of Evidence themselves,[268] which is one of the

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that the Federal Rules should be construed to promote 'growth and development of the law of evidence,' Congress has perhaps made it more difficult than ever before for the law of evidence to grow, since changes in these Rules ordinarily cannot come by adjudication, but must come by amendments of the Rules."); *see also* Edward J. Imwinkelried, *A Brief Defense of the Supreme Court's Approval of the Interpretation of the Federal Rules of Evidence*, 27 IND. L. REV. 267, 293 (1993) (asserting that the "price of having a truly codified body of evidence law is the necessity of resorting to the [statutory] amendment process."). This position is untenable. First, such a construction fails to give effect to Rule 102's language of "promotion of growth and development of the law of evidence." Further, this position seems to be bottomed on the erroneous assumption that legislative amendment cannot coexist with other methods of developing the law. In fact, legislatures generally oversee judicial lawmaking—providing legislative corrections where necessary. Thus, providing a mechanism for legislative amendment does not necessarily reflect a decision to prohibit courts from interstitial rule-making. Instead, Rule 1102 should be understood in tandem with Rule 102. Viewed in this way, the Rules explicitly secure the two traditional modes of legal growth: judicial and legislative. Indeed, court activism in constructing solutions to unanticipated problems is arguably the best precursor to future legislative amendments, as it is the courts that sit in the front lines and confront the myriad of evolving challenges. Judicial efforts thus become the legislators' starting materials.

267. *See, e.g.*, United States v. Bibbs, 564 F.2d 1165, 1169-70 (5th Cir. 1977) (ruling that "the Federal Rules of Evidence do not provide a procedure for impeachment by subsequent inconsistent statements" and relying on Rule 102's charge that the courts "promot[e] growth and development of the law of evidence," the court held that "the trial judge is free to fashion an evidentiary procedure" with regard to impeaching a witnesses's subsequent inconsistent statements and approved the trial courts new impeachment procedure), *cert. denied*, 435 U.S. 1007 (1978); United States v. Jackson, 405 F. Supp. 938, 943-45 (E.D.N.Y. 1975) (allowing defendant to testify while excluding defendant's conviction of armed bank robbery on several conditions that are "not specifically authorized by the rule, which is designed to protect defendants rather than the government from unfair prejudice," because imposing additional conditions is "supported by Rule 102," which authorizes the "court to interpret the Rules *creatively* so as to promote growth and development in the law of evidence in the interests of justice and reliable fact-finding" and making a second evidentiary ruling under conditions not authorized by the Code because "Rule 403, read in light of Rule 102, contemplates a flexible scheme of discretionary judgments by trial courts designed to minimize the evidentiary costs of protecting parties from unfair prejudice") (emphasis added); United States v. Brown, 409 F. Supp. 890, 892 (W.D.N.Y. 1976) (noting that the *Jackson* court "acted legislatively"); *see also* United States v. Pantone, 609 F.2d 675 (3d Cir. 1979); Benna v. Reeder Flying Serv., Inc., 578 F.2d 269 (9th Cir. 1978).

268. *See* U.N.R. Indus., Inc. v. Continental Cas. Co., 942 F.2d 1101, 1107 (7th Cir. 1991) ("The point of the Rules is to identify the forms of proof that will 'secure fairness in administration, elimination of justifiable expense and delay, and promotion of . . . the end that the truth may be ascertained and proceedings justly determined.' [FED. R. EVID.] 102" and concluding that statistical evidence is admissible if introduced by an

hermeneutic moves that is consistent with the Perpetual Index school of codification.[269] Analogy is a logical way of interpreting a code that aims to describe the bulk of a field and that simultaneously recognizes the code's inevitable incompleteness.

As is true of the Uniform Commercial Code, some of the evidentiary rules contain explicit invitations to courts to help develop particular parts of evidence law. Rules 803(24) and 804(b)(5) of the Federal Rules of Evidence are good examples. Rule 802 excludes the admission of hearsay, and Rule 803 lists twenty-three exceptions to Rule 802, for which hearsay will be admitted notwithstanding the availability of the declarant. Rule 803(24) is an invitation to the judiciary to join in advancing evidence law, and is designed to ensure that the twenty-three exceptions do not halt development of the law.[270] Rule 804(b)(5)

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expert, as defined by Rule 702, and if, under Rule 703, the data is of the sort relied upon by experts in the field), *cert. denied*, 112 S. Ct. 1586 (1992); State v. Dorsey, 539 P.2d 204 (N.M. 1975) (quoting Rule 102's instruction to "promot[e the] growth and development of the law of evidence" and referring to Rules 401, 402, 702, and 703—the rules relating to relevance and export witnesses—to overrule the common law requirement that polygraph tests be allowed into evidence only if the test is stipulated to by both parties to the case and where no objection is offered at trial).

269. *See supra* part I.A.3.

270. Rule 803(24) allows into evidence a

> statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

*See* FED. R. EVID. 803(24) advisory committee's note (noting that while the 23 exceptions "take full advantage of the accumulated wisdom and experience of the past in dealing with hearsay . . . . It would, however, be presumptuous to assume that all possible desirable exceptions to the hearsay rule have been catalogued and to pass the hearsay rule to oncoming generations as a closed system" and observing that 803(24) leaves "room . . . for growth and development of the law of evidence in the hearsay area"); *see also* Garner v. United States, 439 U.S. 936 (1978) (Stewart, J., dissenting) ("It seems to me open to serious doubt whether Rule 804(b)(5) was intended to provide case-by-case hearsay exceptions, or rather only to permit expansion of the hearsay exceptions by categories.").

At least one noted scholar has argued that Rule 803(24) should be viewed as a source of equitable power in particular cases but not to sanction the development of new general categories of hearsay exceptions. *See* WEINSTEIN & BERGER, *supra* note 227, at 803-27 (advocating that "Rule 803(24) should be interpreted to authorize the admission of hearsay evidence of high probative value in individual situations, but not to create new class exceptions"). Such an approach seems dubious in light of the unambiguous Advisory Committee's note to Rule 803(24), which states that the Rule leaves "room . . . for *growth and development* of the law of evidence in the hearsay area," (emphasis

employs the identical language, and was intended to allow continued growth of the law of hearsay exceptions when the declarant is unavailable.[271] Courts have liberally invoked Rules 803(24) and 804(b)(5).[272] Consistent with the purposes of these rules, a new general hearsay exception, pertaining to children's statements to adults regarding sexual abuse, appears to be in the formation.[273]

Rule 501 is another rule inviting judges to explicitly and self-consciously develop evidentiary law. That rule provides that the law of privileges "shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."[274] The legislative history behind this rule explicitly noted that Rule 501 was "not intended to freeze the law of privilege as it now exists" but that it was intended to "permit[] the courts to develop a privilege for newspaperpeople on a case-by-case basis."[275] Courts have relied on this legislative history to support their active and explicit participation in the development of such law.[276]

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added) in particular, and in view of Rule 102, generally. *See supra* part III.B.3.a.

271. *See* FED. R. EVID. 804(b)(5) advisory committee note ("In language and purpose, this exception is identical with Rule 803(24).").

272. *See, e.g.*, United States v. Farley, 992 F.2d 1122 (10th Cir. 1993) (allowing statements by child abuse victim to her mother into evidence under Rule 803(24)); United States v. Blackburn, 992 F.2d 666, 672 (7th Cir.) (allowing computer printouts of lensometer readings for eyeglasses left in a stolen getaway car into evidence under 803(24) because tests were completely mechanical and objective), *cert. denied*, 114 S. Ct. 393 (1993); United States v. Treff, 924 F.2d 975, 983 (10th Cir.) (allowing diaries of defendant's late wife into evidence under Rule 804(b)(5)), *cert. denied*, 111 S. Ct. 2272 (1991); Keith v. Volpe, 618 F. Supp. 1132, 1161 (D.C. Cal. 1985) (allowing surveys into evidence because the "admission of surveys promotes the development of the law of evidence because surveys are often the most expeditious way pertinent information may be ascertained and proceedings justly determined"). *See generally* 4 WEINSTEIN & BERGER, *supra* note 227, at 803-430 to 803-443, 804-183 to 804-189 (collecting cases).

273. *See Farley*, 992 F.2d 1122; United States v. Ellis, 935 F.2d 385 (1st Cir.), *cert. denied*, 112 S. Ct. 201 (1991); United States v. Grooms, 978 F.2d 425 (8th Cir. 1992). In all these cases, the courts permitted adults to testify concerning the out-of-court statements or actions of children who were thought to be the victims of sexual abuse.

274. FED. R. EVID. 501.

275. 120 CONG. REC. H12,254 (1974).

276. *See, e.g.*, *In re* Grand Jury Impaneled Jan. 21, 1975, 541 F.2d 373 (3d Cir. 1976) ("The legislative history of rule 501 indicates clearly that the rule was intended, in federal question and criminal cases, to leave the federal law of privileges in its current posture, to be developed by the judiciary by resort to the 'principles of the common law as . . . interpreted . . . in the light of reason and experience.'"); United States v. Allery, 526 F.2d 1362, 1 Fed. R. Evid. Serv. (Callaghan) 186, 190 (8th Cir. 1975) ("We hold, therefore, that this Court, as well as other federal courts, has the right and the responsibility to examine the policies behind the federal common law privileges and to alter or amend them when 'reason and experience' so demand.").

Consistent with the spirit of Rule 102, courts also have given great effect to open-ended language in other rules. For example, Rule 404(b) provides that other acts evidence "may, however, be admissible for other purposes, *such as* . . . ."[277] Relying on "such as," the court in *United States v. Figueroa* [278] determined that it was "clear from the language of Rule 404(b) . . . that 'other acts' is admissible for relevant purposes beyond those recited in the rule."[279]

(3) Other Codes

Most other recent American codifications have utilized similar provisions inviting courts to assist in developing the law. Section 1.102 of the Uniform Residential Landlord and Tenant Act and its comment are almost exactly parallel to section 1-102 of the U.C.C. and its official comment. Section 1.102 of the Uniform Residential Landlord and Tenant Act provides as follows:

> (a) This Act shall be liberally construed and applied to promote its underlying purposes and policies.
> (b) Underlying purposes and policies of this Act are
> (1) to simplify, clarify, modernize, and revise the law governing the rental dwelling units and the rights and obligations of landlords and tenants;
> (2) to encourage landlords and tenants to maintain and improve the quality of housing . . . .[280]

The comment to this section states that

> [l]iberal construction of this Act and its application for promotion of its underlying purposes and policies *will permit development by the courts in light of unforeseen and new circumstances and practices*.[281]

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Additionally, Rule 501 often is read in conjunction with Rule 102 to justify explicit and significant quasi-legislative action on the part of the judiciary. *See* Lora v. Board of Educ., 74 F.R.D. 565, 578-83 (E.D.N.Y. 1977); *see also* Trammel v. United States, 445 U.S. 40, 47 (1980) (Rule 501 "manifests an affirmative intention not to freeze the law of privilege. Its purpose rather was to "continue the evolutionary development of testimonial privilege."); Lewis v. United States, 517 F.2d 236, 238 n.4 (9th Cir. 1975).

277. FED. R. EVID. 404(b) (emphasis added).

278. 976 F.2d 1446 (1st Cir. 1992), *cert. denied*, 113 S. Ct. 1346 (1993).

279. *Id.* at 1454; *see also* United States v. Walters, 904 F.2d 765, 768 (1st Cir. 1990) (similar determination).

280. UNIF. RESIDENTIAL LANDLORD AND TENANT ACT § 1.102.

281. *Id.* comment (emphasis added).

Similar provisions are found in most other Codes.[282]

(4) A Brief Comment on the Recent Scholarly Debate as to How the Federal Rules of Evidence Ought to be Construed

Understanding that the Federal Rules of Evidence is a codification of law that has been designed, as have other recent codifications of common law, to avoid ossifying the law sheds light on a recent debate between Professors Imwinkelried and Weissenberger as to how the Federal Rules of Evidence ought to be construed. Applying the interpretive principle of *expressio unius est exclusio alterius* to Rule 402, Professor Imwinkelried has argued that the Federal Rules of Evidence have preempted the power of the federal courts "to create uncodified exclusionary rules and superimpose or engraft such rules onto the statutory language."[283] Professor Imwinkelried relies heavily on recent dictum in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, where the Supreme Court declared "[w]e interpret the legislatively-enacted Federal Rules of Evidence as we would any statute."[284] Relying predominantly on Rule 102, Professor Weissenberger, by contrast, has argued that the Rules intend federal courts to retain authority to continue "their time-honored role in interpreting and expanding evidentiary doctrines according to such traditional and expressly articulated values as 'truth' and 'justice'."[285]

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282. *See, e.g.*, UNIF. SIMPLIFICATION OF LAND TRANSFERS ACT § 1-102 (1990); MODEL REAL ESTATE COOPERATIVE ACT § 1-102 (1981); UNIF. PROBATE CODE § 1-102 (1990).

283. Imwinkelried, *supra* note 266, at 273-74. Translated, the legal maxim means that "if a document provides for one thing, other things are impliedly excluded." *See id.* Professor Imwinkelried observes that Rule 402

> list[s] exclusionary rules of evidence based on four sources of law: "the Constitution of the United States, . . . Act of Congress, . . . these rules, or . . . other rules prescribed by the Supreme Court pursuant to statutory authority." However, this list contains no mention of a fifth source, namely, case, common, or decisional law. The inference is that the drafters intended to exclude that fifth source. The maxim [of *expressio unius est exclusio alterius*] thus points to the conclusion that Rule 402 precludes the courts from enforcing uncodified exclusionary rules of evidence; case law or decisional authority is *not* a permissible basis for excluding relevant evidence.

*Id.* at 274-75 (footnotes omitted, emphasis in original).

284. 113 S. Ct. 2786, 2793 (1993).

285. Glen Weissenberger, *Are the Federal Rules of Evidence a Statute?*, 55 OHIO ST. L.J. 393, 402 (1994); *see also* Glen Weissenberger, *The Supreme Court and the Interpretation of the Federal Rules of Evidence*, 53 OHIO ST. L.J. 1307, 1330-31 (1992) (arguing that "the preservation or engraftment of additional evidentiary doctrines and principles was not precluded, but rather, specifically contemplated as integral to the

The key to resolving the above hermeneutical dispute is to place the Federal Rules of Evidence in its appropriate jurisprudential perspective. The Federal Rules of Evidence must be seen for what they are—a codification of the common law. Rule 102 is that Code's mechanism —analogous to the Uniform Commercial Code's sections 1-102, 2-716, and 2-313[286]—for avoiding the dangers of ossification and ensuring that evidence law can continue to evolve. Tellingly, Professor Imwinkelried's article advocating that federal courts do not retain the power to "create general, categorical evidentiary doctrines"[287] makes no reference at all to Rule 102.[288] Professor Imwinkelried argues that the only powers left with the federal courts are to make "ad hoc, case-specific" adjustments.[289] Reiterating other language in *Daubert* that "the rules occupy the field,"[290] Professor Imwinkelried has adopted a view of codification comporting more with the Field Comprehensive model than the Perpetual Index prototype.[291]

The recent American codifications, however, have belonged to, and properly are interpreted in accordance with, the Perpetual Index archetype. A particularly apt illustration is provided by the Federal Rules of Civil Procedure, the *other* major codification of federal common law.[292] The Supreme Court has held that the codification of civil procedure has not displaced the inherent powers of federal courts to fashion procedures unaddressed by the codification because "there is no indication of an intent to displace the inherent power."[293] Moreover, the Court has determined that courts' inherent powers to fashion procedure have survived codification even concerning procedural matters addressed by specific provisions in the Federal Rules of Civil

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structural scheme of the Rules"); Randolph N. Jonakait, *The Supreme Court, Plain Meaning, and the Changed Rules of Evidence*, 68 TEX. L. REV. 745 (1990) (noting that the Supreme Court's recent approach to interpreting the Federal Rules of Evidence has muffled the growth of evidence law).

286. *See supra* part III.B.3.a.

287. Imwinkelried, *supra* note 266, at 290.

288. *See id.*

289. *Id.*

290. *See id.* at 284 (quoting Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S. Ct. 2786, 2794 (1993)).

291. *See supra* part I.A.2.

292. While the Federal Rules of Civil Procedure introduced significant procedural reforms, for the most part they codified the nonevidentiary procedural rules that courts created during centuries of common law practice.

293. *See* Chambers v. Nasco, Inc., 501 U.S. 32, 48 n.13 (1991); *see also id.* at 46 (holding that "[a]t the very least, the inherent power must continue to exist to fill in the interstices").

Procedure.[294] Both these holdings are consistent with a codification belonging to the Perpetual Index prototype.

Evidentiary rules and general procedural rules both are members of the same "nuclear family,"[295] and the mode of code interpretation employed with regard to the Federal Rules of Civil Procedure is equally appropriate for the Federal Rules of Evidence. Indeed, not only is there no provision in the Federal Rules of Evidence indicating an intent to foreclose judicially-led development of evidence law, there is a provision explicitly *inviting* such judicial participation: Rule 102. Professor Weissenberger's understanding of Rule 102 is proper. And to the extent the Supreme Court's interpretive dictum in *Daubert* could mean that the Federal Rules of Evidence should be construed as an ordinary statute with respect to growth of the law, such an approach to the Federal Rules of Evidence evinces a misunderstanding that threatens to undermine the very code protection sculpted to allow continued legal growth.[296]

*b. Absence of Invitations*

The call for the judiciary to join in the development of the law is conspicuously absent from the Uniform Trusts Act and the Uniform Trustee's Powers Act. While each of these Acts has specific provisions granting equitable discretion to the court,[297] an allowance for equitable adjustments in particular cases is distinct from authorizing judges to reshape the law's general application.

The driving force behind not inviting courts to advance the law is a sense that the law in these two fields is complete and final. Although it is too early to empirically determine whether the drafters' judgment of final development was correct—for there has been only limited caselaw

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294. *See* Roadway Express, Inc. v. Piper, 447 U.S. 752, 767 (1980) (remanding to determine whether sanctions should be imposed pursuant to either FED. R. CIV. P. 37 *or* the court's inherent power); Link v. Wabash R.R., 370 U.S. 626, 630-32 (1962) (holding that federal courts retain inherent power to dismiss a case *sua sponte* for failure to prosecute, even though FED. R. CIV. P. 41(b) provides rules regarding motions to dismiss).

295. *See infra* part III.B.3.

296. It is not surprising that the Supreme Court has not been sensitive to the code-quality of the Federal Rules of Evidence. The Court has only limited occasion to deal with codes, for most codes are codifications of *state* law. The Federal Rules of Evidence and the Federal Rules of Civil Procedure are the two major exceptions.

297. *See* UNIF. TRUSTS ACT § 19 (1990); UNIF. TRUSTEE'S POWERS ACT § 5 (1990).

involving these codes—there is cause to be skeptical about claims of doctrinal finality.[298] Few, if any, legal doctrines stand still.

*c. Do Invitations Matter?*

It could fairly be argued that citations to courts that have relied on U.C.C. section 1-102 or Rule 102 of the Federal Rules of Evidence do not demonstrate that without such a provision courts would have acted any differently. In *Northpark National Bank v. Bankers Trust Co.*,[299] for example, the court decided to expand the list of duties that U.C.C. section 4-202(1) enumerates, without referencing section 1-102's invitation to help develop the law.[300] The court frankly acknowledged that section 4-202(1)(b) "cannot fairly be said to have been drafted in contemplation of the facts in this case" and framed the question before it as "whether [section 4-202(1)(b)] should be interpreted to cover the situation at hand."[301] The court elected to make actionable the collecting bank's failure to send a notice of non-payment, even though this was not one of the enumerated duties of section 4-202, because "the ultimate standard is dictated by the imperatives of sound banking practice . . . ."[302] Even though the *Northpark* court did not specifically reference section 1-102, it did cite as support a significant amount of U.C.C. legislative history,[303] which is the jurisprudential womb from which section 1-102 was born and thus may be considered the functional equivalent of citing to that section.[304] Cases deviating from the Code's text which fail to explicitly reference section 1-102 often rely on

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298. *Cf.* ARTHUR L. CORBIN, CORBIN ON CONTRACTS 534 (1952) (noting the "evolutionary character of our law, with its continual breaking down of accepted rules and the 'restatement' of new ones").

299. 572 F. Supp. 524 (S.D.N.Y. 1983).

300. *Id.* at 533-35.

301. *Id.* at 533.

302. *Id.* at 534.

303. *Id.* at 533 ("The history of the U.C.C. makes it abundantly clear that, especially in the context of those provisions which impose a duty of care, the Code's watchword is 'flexibility.'").

304. Similarly, in construing the Federal Rules of Evidence, some courts have arrogated to themselves the power to deviate from the formal requirements of the rules without justifying themselves by means of Rule 102. *See, e.g.*, United States v. Bailey, 581 F.2d 341, 348 (3d Cir. 1978) (justifying deviation from Rule 803(24)'s and 804(b)(5)'s formal notice requirements on the basis that "the purpose of the rules and the requirement of fairness to an adversary . . . are satisfied"). The *Bailey* court, however, cited as precedent court opinions that *had* explicitly relied on Rule 102. This at least partially counters the claim that equity-providing provisions are not relevant.

analogous legislative history or official comments indicating the drafters' intent that courts play an activist role.

The argument that without section 1-102 (and its equivalent) courts would have acted no differently still does not fade with this observation, of course. In fact, the framers of the U.C.C. themselves recognized that the mere manipulation of doctrinal categories can generate desired results. The official comment to section 2-302 "Unconscionable Contract or Clause" states that

> [t]his section is intended to make it possible for the courts to police *explicitly* against the contracts or clauses which they find to be unconscionable. *In the past such policing has been accomplished by adverse construction of language, by manipulation of the rules of offer and acceptance or by determination that the clause is contrary to public policy or to the dominant purpose of the contract.*[305]

The very fact that the drafters of the U.C.C. incorporated section 2-302, however, shows that the drafters perceived a benefit in so doing. Explicitly granting power to develop the law broadens the base of judges who will participate, since it is likely that some judges (if not most) otherwise would be unwilling to engage in aggressive hermeneutics that add to or rewrite the Codes' plain meaning. Moreover, unless one holds the position that interpretation of legal texts[306] is wholly indeterminate and arbitrary, judicial participation pursuant to legislative grant is a more politically legitimate act.

*d. Invitations to the Legislatures*

The final type of invitation for further development issued by codes are those invitations directed to the legislature. The concept of an "invitation to legislatures" might be puzzling; legislatures can always rewrite the code, which, after all, is a piece of legislation. Empirically, however, legislative attention to code reform appears to be a function of whether a standing committee exists to monitor the code and report

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305. U.C.C. § 1-102 (emphasis added).

306. I specify *legal* texts because it is possible that interpretation similar to the open texturedness described by deconstructionists and other post-modernists is descriptive of the reading of *certain* texts. *See, e.g.*, Posner, *supra* note 84, at 1374 ("The functions of legislation and literature are so different, and the objectives of the readers of these two different sorts of mental product so divergent, that the principles and approaches developed for the one have no useful application to the other.").

progress and problems to the legislature.[307] The benefits of the institutional presence of official standing committees are not replicated by Bar and scholarly attention to reform.

The presence of standing committees thus constitutes a de facto invitation to the legislature. Most of the enacted codes—including the Uniform Commercial Code and the Federal Rules of Civil Procedure—did establish standing committees. These committees have brought about constant revisions to their respective codes.[308] The Federal Rules of Evidence, by contrast, issued no such invitation to Congress.

Legislatures' institutional limitations prevent them from active involvement in the detailed workings-out of codes. There is, however, a benefit to invitations for legislative development: a corollary of the observations of the Meta-Scheme school of codification,[309] which will be elaborated in Section IV, is that the idiosyncratic spirit of the code frequently swallows alternative approaches to the law and, additionally, erodes awareness of other possibile alternatives. The legislatures are particularly suited to bring about significant reorientations to the law, since by *not* getting caught up in the laws' details, they are more likely to maintain the perspective necessary to see the codes' meta-schemes and the debatable bases upon which the doctrine rests. The benefit of retained perspective theoretically enjoyed by the legislature, however, is frequently lost because the standing committees are often populated by lawyers.

## IV. THE NOTABLE REPERCUSSIONS OF THE CODE'S SCOPE, ORGANIZATIONAL SCHEME AND SPIRIT ON THE LAW'S POST-CODIFICATION DEVELOPMENT

Although the fear that codification would freeze the law has not been entirely borne out, neither has that fear been entirely unrealized. Code drafters had hoped to avoid ossification by including provisions inviting judges to further develop the law. But those provisions have not had the

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307. *See* Edward R. Becker & Aviva Orenstein, *The Federal Rules of Evidence After Sixteen Years—The Effect of 'Plain Meaning' Jurisprudence, the Need for an Advisory Committee on the Rules of Evidence, and Suggestions for Selective Revision of the Rules*, 60 GEO. WASH. L. REV. 857, 859-60 (1992) (noting that while there have been only six substantive amendments in the 17 years since the Federal Rules of Evidence were enacted, there have been over 100 substantive amendments to the Federal Rules of Civil Procedure during that time, and attributing the disparity to the existence of a standing committee that evaluates the rules of civil procedure).

308. *See* Fairfax Leary, Jr. & David Frisch, *Is Revision Due for Article 2?*, 31 VILL. L. REV. 399, 400-01 (1986) (reviewing recent revisions to Articles 3, 4, 6, 8 and 9 of the U.C.C.).

309. *See supra* part I.A.4.

effect of allowing unfettered development of the law due to three code characteristics. The first two characteristics—the scope and organizational scheme of each code—flow from the mechanics of codification, for producing a codification involves two steps: (1) identifying what part of the law belongs to the doctrinal field to be codified (determining the "scope" of the codification), and then (2) organizing the law comprising the doctrinal field in accordance with some logical scheme (the "scheme" of the codification). The third characteristic, the spirit underlying each code, reflects the reality that all legal doctrines are based on nonaxiomatic premises and encourage some types of social behaviors even as they discourage others.[310]

The first characteristic limiting post-code legal growth is the unique scope of each code. As no American codification has sought to codify the entirety of the law,[311] codifiers have had to cordon off the discrete doctrinal area that each code treats. This act of separation, while seeming purely administrative, defines the boundaries of the doctrinal areas within the law and forms the basis of people's expectations for rule-consistency within those areas. Further, defining the scope of a field of law simultaneously determines what lies *outside* the doctrinal field and is thereby legally irrelevant. Finally, the proliferation of "discrete" fields of law, which is concomitant with the production of diverse codes, each having a distinct scope, leads to bureaucratization and hyper-specialization. The first sub-part will explore these consequences of "scope" on the law's subsequent growth.

The second brake on legal growth is the arrangement of each code's materials in accordance with a particular organizing scheme. To the extent the codified doctrine involves a complex interplay of competing policy concerns, the particular scheme adopted inevitably will highlight one (or several) and obscure others. And as the chosen organizational scheme comes to seem intuitively correct over time, the de-emphasized considerations can be expected to be systematically ignored, or even forgotten. This danger is far less acute in common law adjudication, for resolving case-by-case challenges more likely keeps alive the multitude of relevant considerations.

The third dynamic retarding legal growth is the codifiers' choice to adopt one of many possible overarching philosophical approaches to the doctrinal field. Driven by one set of nonaxiomatic, implicit assumptions concerning human needs and the role of the state, the adopted approach

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310. *Cf.* Mark D. Rosen, *Defrocking the Courts: Resolving 'Cases or Controversies,' Not Announcing Transcendental Truths*, 17 HARV. J. L. & PUB. POL'Y 715, 730-32 (1994).

311. *See supra* part I.A.1.

can be seen as the "spirit" underlying the code, while the separate code provisions can be best characterized as the detailed expressions of this underlying spirit. The spirit guides judges in concretizing the codes' rules and filling gaps in the codes.[312] Further, the underlying spirits of codes are major determinants of the direction of post-codification legal growth.[313] Identifying the underlying spirit also enables one to recognize the specific types of behaviors that the codes inspire and deter.

Part IV first explores the effects of scope and scheme on legal development. Examined afterward are the spirits of three significant codes—the Uniform Commercial Code, the Federal Rules of Evidence, and the Model Penal Code—and how they have affected legal growth.

### *A. Scope*

#### 1. INTRODUCTION

What is viewed to be a "discrete" field of law has varied over time.[314] Examined here are three ways that defining the Code's scope by dividing law into discrete fields can affect law's future course of growth.

#### 2. "LIKE" AND "UNLIKE" CASES

No one disputes that like cases should be decided in the same manner and that rules should not make arbitrary distinctions between who is bound by them and who is not. The key question, however, is what constitutes "like" and "unlike" cases, and it is the images of what constitutes a discrete body of law that determine the area within which rules are expected to act consistently. For example, the distinction between contract law and commercial paper allows people to be

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312. *See supra* notes 95-111 and accompanying text.

313. Recognizing the spirit underlying the codified doctrine is vital regardless whether one wishes to retain or reform current law: the decision to conserve current law can be morally justified only if it is informed, and comprehending present law is essential to envisioning alternatives.

314. The history of American legal thought demonstrates that the categories that legalists have utilized to understand and organize the law vary over time. For example, Blaekstone's *Commentaries* do not treat contract as a distinct doctrinal field, but largely as a subset of property law. *See* HORWITZ, *supra* note 58, at 162 (noting that "contract appears for the first time in Book II [of Blackstone's *Commentaries*], which is devoted entirely to the law of property . . . [and] is classified among such subjects as descent, purchase, and occupancy as one of the many modes of transferring title to a specific thing . . . [and] appears for the second and last time in a chapter entitled, 'Of Injuries to Personal Property'"); *see also* Gilmore, *supra* note 13.

undisturbed by the different role played by consideration in these two fields.[315] Similarly, it is the orthodoxy that maritime law is a distinct field that allows wholly different tort doctrines governing damages occurring on the sea and dry land to coexist without accusations that the law is inconsistent.[316]

Codification can be expected to contribute to the congealing of contemporary images as to what constitutes discrete areas of the law. For example, we are left to speculate as to whether, absent Article 2 of the Uniform Commercial Code, the "distinct" doctrinal areas of contracts and torts would have joined together to form the "generalized theory of civil obligation" envisioned by Professor Gilmore.[317] As a result of the continued distinction between the fields of contracts and torts, parties joined by contract are treated differently than strangers bearing no contractual relationship. For example, the obligation to behave in good faith arises only after a contract comes into existence;[318] presence of a contract is deemed to alter the parties' precontractual relationship.[319]

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315. Lack of consideration generally is not a defense to an exchange involving commercial paper, whereas consideration is still a requisite for contract formation. In fact, one scholar has hypothesized that commercial paper was developed as a "distinct" body of law for the very purpose of circumventing contract law's requirements of fairness, of which the doctrine of consideration was a part. *See* Morton J. Horwitz, *The Historical Foundations of Modern Contract Law*, 87 HARV. L. REV. 917, 941-42 (1974).

316. *Cf.* GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY 396-410 (1957).

317. *Cf.* GRANT GILMORE, THE DEATH OF CONTRACT 80-94 (1974).

318. *See infra* note 242.

319. The Model Penal Code operates in the opposite direction by failing to distinguish between scenarios that many intuitively feel to be different. By circumscribing criminal law as a discrete legal field, the Model Penal Code works against the efforts of those seeking to reconceptualize socially undesirable acts as understandable responses to social and economic deprivation. *See, e.g.*, Richard Delgado, *"Rotten Social Background": Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?*, 3 LAW & INEQ. J. 9, 10 (1985) ("[M]any turn to crime because of their poverty . . . . Poverty is, for many, a determinant of criminal behavior.") (footnote omitted); Abner J. Mikva, *It's Time to "Unfix" the Criminal Justice System*, 20 HASTINGS CONST. L.Q. 825, 832 (1993) ("[W]e must stop trying to use the criminal justice system for problems that it can't cure, such as . . . poverty, . . . . The price of just hating our rule-breakers and meting out long prison sentences is hurting us in our pockets and everywhere else."); *see also* ANDREW HACKER, TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL (1992); Robert J. Sampson, *Urban Black Violence: The Effect of Male Joblessness and Family Disruption*, 93 AM. J. SOC. 348 (1987). For purposes of culpability, social or economic deprivation is not a legally relevant fact that is viewed as making the acts undertaken by a rich person and a poor person "different." *See* Delgado, *supra*. Two sets of acts—crimes committed by socially disadvantaged and wealthy persons—therefore are treated alike by the law.

Article 2 of the Uniform Commercial Code illustrates yet another scope-related byproduct of codification. Although Article 2 explicitly indicates that it is applicable only to sales of goods,[320] that Article has been largely perceived by practitioners (and many academics) as providing the general paradigm for contract law. For example, courts frequently refer to Article 2 for guidance outside the context of sales of goods.[321] Similarly, experience and analysis of contract text books confirms that first year students' introduction to contract law is taught, in large measure, through Article 2.[322] Thus, the Code's demarcation of its scope has been ineffectual. Because there has been no countereffort to codify most other aspects of contract law, Article 2 has had a significant, if not overwhelming, gravitational effect outside its scope. This is troublesome. After all, the drafters of Article 2 undoubtedly limited its scope due to their sensitivity to the determinative importance of differing factual contexts.[323] Partial codification of contract law thus has had the effect of advancing a jurisprudence of "general" contract law.[324]

### 3. JETTISONING ENTIRE PARTS OF THE LAW

As the code's scope demarcates what is part of the legal field, it simultaneously determines what is *not* a part of the field. In so doing, codification may exclude concerns that traditionally have been, or which may have become, part of the doctrinal field.

Codification's danger of jettisoning is well exemplified by the Federal Rules of Evidence. That codification is almost entirely devoted to determining what types of evidence are admissible.[325] Almost wholly ignored in the Rules, however, is the law governing what happens *after*

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320. U.C.C. § 2-102.

321. *See supra* text accompanying notes 239-40.

322. *See infra* note 411.

323. *See supra* part III.A.2.

324. *Cf.* ATIYAH, *supra* note 151.

325. Seven of the Federal Rules of Evidence's eleven Articles deal almost exclusively with questions of admissibility: Judicial Notice (Article II), Relevancy (Article IV), Privileges (Article V), Opinions and Expert Testimony (Article VII), Hearsay (Article VIII), Authentication and Identification (Article IX), and Contents of Writings, Recordings, and Photographs (Article X). Two other Articles deal predominantly with admissibility: General Provisions (Article I) and Witnesses (Article VI). Of the remaining two Articles, Article XI details the applicability of the Federal Rules of Evidence and Article III outlines the applicable presumptions in civil actions and proceedings. *Cf.* Ronald J. Allen, *The Explanatory Value of Analyzing Codifications by Reference to Organizing Principles Other Than Those Employed in the Codification*, 79 NW. U. L. REV. 1080, 1084 (1985).

evidence is admitted —that is, the valid and invalid inferences that can be drawn from the admitted evidence, known as the "process of proof." The nature of inferences drawn from admitted evidence is only tangentially addressed by Rule 401, which is used primarily to determine admissibility.[326] The only procedural rules that directly touch on impermissible inferences drawn from admitted evidence are the rules governing directed verdicts and judgments notwithstanding the verdict, under which a judge is empowered either to take a case from the jury or to reverse a jury's determination.[327] Significantly, these are general procedural rules that are not even part of the codified rules of evidence. Following the cue, the bulk of judicial and scholarly attention has focused on questions of admissibility.[328]

A moment's thought brings to mind the oddity of marginalizing the process of proof: intuition suggests that this subject stands at the center of a system of evidentiary law dedicated primarily to factfinding. Indeed, the marginalized role accorded to inference under the Federal Rules of Evidence stands in stark contrast to the significant attention evidence experts of the pre-code era paid this subject.[329]

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326. Under FED. R. EVID. 401, "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." FED. R. EVID. 402 instructs that "[a]ll relevant evidence is admissible," subject to certain exceptions. While it may be true that authors of nineteenth- and early twentieth-century evidence treatises employed doctrines of relevance that incorporated theories of inferentiation, *see* Peter Tillers, *Webs of Things in the Mind: A New Science of Evidence*, 87 MICH. L. REV. 1225, 1225 (1989), the expansive meaning given to "relevance" under the Federal Rules of Evidence—under which nearly *all* information is relevant—undercuts any suggestion that FED. R. EVID. 401 is the repository of a true theory of inferentiation, that is, a theory that provides a limiting principle identifying improper inferences.

327. *See* FED. R. CIV. P. 50(a) (allowing a court during a trial by jury to determine an issue and enter judgment as a matter of law if "there is *no legally sufficient evidentiary basis for a reasonable jury to find for that party* on that issue") (emphasis added); FED. R. CIV. P. 50(b) (allowing a judge to enter judgment as a matter of law contrary to the finding of a jury for same reason as under FED. R. CIV. P. 50(a)).

328. *See* Richard Lempert, *The New Evidence Scholarship: Analyzing the Process of Proof*, 66 B.U. L. REV. 439, 439-40 (1986) (observing that the bulk of evidence scholarship until recently has been limited to critiquing individual rules in the Federal Rules of Evidence). *But see* WIGMORE, *supra* note 36, § 37; Symposium, *Probability and Inference in the Law of Evidence*, 66 B.U. L. REV. 377 (1986).

329. *See, e.g.*, GEOFFREY GILBERT, THE LAW OF EVIDENCE (Garland Publishing, Inc. 1979) (1754) (organizing the different types of evidence into a hierarchy on the basis of their evidentiary value); JOHN H. WIGMORE, THE SCIENCE OF JUDICIAL PROOF (3d ed. 1937) (seeking to develop an analytic method to determine the weight or value of evidence). *See generally* Barbara J. Shapiro, *'To a Moral Certainty': Theories of Knowledge and Anglo-American Juries 1600-1850*, 38 HASTINGS L.J. 153, 175 (1986) (noting that seventeenth- and eighteenth-century authors of evidence treatises "found it

While process of proof certainly has not been wholly forgotten by the scholarly community,[330] those evidence scholars who pursue this study are hamstrung in their efforts to transform their discussions from academic musings to actuality. They cannot tie their conclusions to code provisions that provide the needed force of legal authority. And although scattered cases that have raised the issue of inferentiation in particularly stark terms have prompted interesting dialogues among academics,[331] such analyses inhabit merely the edges of evidence scholarship. These scholarly musings, moreover, have had little effect on the law of evidence; for example, a body of law has not emerged regulating the permissible and impermissible inferences that can be drawn from different types of admitted evidence. This is probably at least in part attributable to the "scope" adopted by the Federal Rules of Evidence, which effectively has jettisoned inferentiation from the body of evidence law.

Of course, a codification can operate in the opposite direction and bring together under one doctrinal roof areas of law that previously were not treated collectively. In one respect, the Model Penal Code exemplifies such an effort. That Code is composed of four parts: (1) General Provisions, (2) Definition of Specific Crimes, (3) Treatment and Correction, and (4) Organization of Correction. The Model Penal Code thus encourages students and practitioners of criminal law to consider the rules that lead to conviction in conjunction with prisoners' post-conviction treatment. Although the convict is ostracized from general society, the law does not forget her once a verdict of "guilty" is rendered. Part III of the Code includes articles dealing with the suspension of sentence, probation, fines, short-term imprisonment, long-term imprisonment, parole, and the loss and restoration of rights incident to conviction or imprisonment. And Part IV of the Code details the structures of the

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necessary to place their treatments of legal evidence in the context of current epistemological thought").

330. *See supra* note 319.

331. *See, e.g.*, *In re* Agent Orange Prod. Liab. Litig., 611 F. Supp. 1267, 1284-85 (E.D.N.Y. 1985), *aff'd*, 818 F.2d 187 (2d Cir. 1986), *cert. denied*, 487 U.S. 1234 (1988) (ruling that epidemiological studies are necessary proof to get a mass toxic tort case to the jury); People v. Collins, 438 P.2d 33, 41 (Cal. 1968) (reversing because "'trial by mathematics' . . . so distorted the role of the jury and so disadvantaged counsel for the defense, as to constitute in itself a miscarriage of justice"); Smith v. Rapid Transit Inc., 58 N.E.2d 754 (Mass. 1945). These three cases have received the bulk of the academics' attention. *See, e.g.*, Charles Nesson, *Agent Orange Meets the Blue Bus: Factfinding at the Frontier of Knowledge*, 66 B.U. L. REV. 521, 525-26, 531-38 (1986); Neil B. Cohen, *The Costs of Acceptability: Blue Buses, Agent Orange, and Aversion to Statistical Evidence*, 66 B.U. L. REV. 563, 563-65 (1986). It is notable that very few cases are referenced during the course of nearly 600 law review pages of the Boston University Symposium, *supra* note 328.

Department of Correction and the Board of Parole, as well as procedures for administering the penal institutions. The post-conviction attentiveness found in the Model Penal Code is a departure from the practices of other cultures and eras.[332]

On the other hand, the Model Penal Code extends the attentiveness timeline only in the post-conviction direction. As discussed above, the Model Penal Code does not place the criminal act in a context that takes account of pre-act factors such as social and economic deprivation.[333] Under the scope of the Model Penal Code, the market system is jettisoned from the concerns of criminal law. Consequently, as with process of proof under evidentiary law, studies exploring the connection between resource differentials and crime are disempowered. Such writings are relegated to the status of scholarly musings rather than doctrinal refinements since there is no legal corpus upon which these scholars readily can secure their theories. The Model Penal Code thus incorporates a strong political statement against those who argue that behavior currently labelled "criminal" is largely a function of social environment and that reducing the vast resource and opportunity differentials across society is a prerequisite to diminishing crime.[334]

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332. For example, examination of the great nineteenth-century English treatise writers reveals that substantial attention was given to defining the criminal act but little or no study was made of penology. *See* 1 SIR JAMES F. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 457 (London, MacMillan & Co. 1883) (dedicating only 35 of the treatise's nearly 1800 pages to the criminal's post-conviction treatment, the bulk of which comprises a "history of the various punishment inflicted by law for different offences" throughout history); 2 SIR FREDERICK POLLOCK & FREDERIC W. MAITLAND, THE HISTORY OF ENGLISH LAW: BEFORE THE TIME OF EDWARD I 451-52, 462-511 (2d ed. Cambridge Univ. Press 1968) (1898) (spending one and one half pages of the treatise's 63 pages concerning criminal law on punishment). The tendency to think of criminal law as if it only concerns conviction has not abated. *See, e.g.*, GLANVILLE WILLIAMS, CRIMINAL LAW (2d ed. 1961) (not discussing post-conviction at all during this nearly thousand page treatise authored by one of contemporary England's most respected criminal experts).

333. *See supra* note 319.

334. *See* the sources cited *supra* note 319.

It is true that, unlike evidence law and process of proof, pre-Code criminal law did not include the market system and society's resource differentials within its scope. But it is not overly conjectural to suggest that the scope of criminal law may have eventually expanded to include such pre-act considerations, especially since contemporary psychology and sociology theories place ever-growing emphasis on environmental factors influencing individuals' development. The Model Penal Code's scope may very well operate as an intellectual bulwark against contemporary social scientific thought.

### 4. BUREAUCRATIZING THE LAW AND OBSCURING POTENTIALS FOR LAW REFORM

Producing codes that are not Fully Comprehensive (as has been the case in this country)[335] has the effect of divvying up law into discrete components. This can lead to a danger of "bureacratizing" law, where scholars become experts in many "distinct" fields and thereby dig deeply but not broadly.[336] If, as is often the case, the experts do not communicate with one another sufficiently, the law may not develop in an integrated manner. Further, as is true in the executive branch, bureaucratization may serve a "buck-passing" function, where responsibility for making reforms is diffused over many "different" legal fields. The result may be that members of each field come to view the legal framework as immutable and defined by "other" fields within which their doctrine operates—a bitter irony, since the framework may limit the possibilities of the doctrines with which they have expertise. A concrete example might be helpful to illustrate the danger of buck-passing. Although many legalists intuitively sense that evidence constitutes a discrete legal field, a moment's reflection exposes the degree to which evidence law is not self-determining but, instead, is a function of two factors not generally thought to be part of the law of evidence: the jury system[337] and the adversarial nature[338] of our litigation system. For example, the bulk of the Federal Rules of Evidence concern rules of exclusion,[339] which are designed to keep certain categories of relevant information from jurors, who, it is feared, would give such evidence

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335. *See supra* part I.A.1.

336. It is worthwhile noting that bureaucratization of the law is not inevitable, but is a phenomenon that is both historically and culturally specific. There simply are no modern-day American Justinians or Blackstones who master and integrate the entirety of the law. Even judges, who generally have the broadest grasp of law in the American legal world, experience only segments of the legal world due to jurisdictional limitations and the practicalities of caseload distribution. Further, mastery of the entire legal complex is not a modern-day impossibility; such systemic masters can be found in other complex modern cultures, such as the Jewish and Islamic legal systems. *See, e.g.*, MOSES FEINSTEIN, IGROT MOSHE (compilation of legal decisions by twentieth-century Jewish legalist spanning the breadth of Jewish law).

337. *See* J.B. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 266 (1898).

338. *See* WIGMORE, *supra* note 36, § 6.5, at 457-58; Stephan Landsman, *From Gilbert to Bentham: The Reconceptualization of Evidence Theory*, 36 WAYNE L. REV. 1149, 1150-86 (1990) (correlating the change in evidence law during the eighteenth century with the rise of the adversarial trial methodology).

339. *See supra* note 325.

undue weight or would draw improper inferences.[340] Most European litigation systems, by contrast, which are based on a nonjury inquisitional model, contain no exclusionary rules of evidence, and instead allow into evidence nearly all relevant information, with the exception of matters of privilege and personal incompetence.[341] Closer to home still, during formal adjudications in administrative agencies, which do not involve juries, *all* relevant and arguably reliable evidence is admitted.[342] An example of the determinative role adversarialism plays in shaping the law of evidence can be found in the 600, 700, and 900 Rules, under which the attorneys (rather than the court or some other neutral body) choose their own experts, witnesses, and exhibits. The spirit of adversarialism also lurks behind the evidentiary norm that permits parties to prepare their experts and witnesses ahead of trial. It would not be an exaggeration to say that the evidentiary rules found in the Federal Rules of Evidence are almost entirely a function of the "non-evidentiary" adversarial and jury traits of the American litigation system.

And which legal scholars study the nature of the American litigation system? Not evidence scholars, for the most part.[343] While some scholars of civil procedure, criminal procedure, constitutional law, and comparative law give some consideration to America's litigation system, the system, as an organic whole, has received surprisingly little scholarly attention.[344] This lack of scholarly attention may also be attributable to

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340. *See* THAYER, *supra* note 337, at 266; WIGMORE, *supra* note 36, § 8c, at 632. *But see* John H. Langbein, *The Criminal Trial Before the Lawyers*, 45 U. CHI. L. REV. 263, 306 (1978).

341. *See* SCHLESINGER ET AL., *supra* note 6, at 424-25, 529.

342. *See* Administrative Procedure Act, 5 U.S.C. § 556(d) (1988) ("Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence."). The administrative law judge evaluates the evidence's probative value in his findings of fact. *See generally* 2 KENNETH C. DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW 117 (3d ed. 1994).

343. *Cf.* Michael L. Seigel, *A Pragmatic Critique of Modern Evidence Scholarship*, 88 NW. U. L. REV. 995, 1018-19 (1994). *But see* Charles Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357 (1985).

344. A few works exhaust nearly the entire field of contemporary scholarly writings giving serious consideration to the adversarial basis of our litigation system. *See* THE BROOKINGS INSTITUTE, VERDICT: ASSESSING THE CIVIL JURY SYSTEM (Robert E. Litan ed., 1993); MARVIN E. FRANKEL, PARTISAN JUSTICE (1980); STEPHAN LANDSMAN, READINGS ON ADVERSARIAL JUSTICE: THE AMERICAN APPROACH TO ADJUDICATION (1988); Lon L. Fuller, *The Adversary System*, *in* TALKS ON AMERICAN LAW 34 (Harold J. Berman ed., 2d ed. 1971); John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823 (1985); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

the Federal Rules of Civil Procedure, another Code that furthers bureaucratization by failing to acknowledge the determinative roles adversarialism plays in the jury system. Thus, under the contemporary bureaucratization of the law, evidence scholars tend to take as axiomatic the very aspects of the litigation system that are largely determinative of their own field.[345] The results are twofold: the scope of contemplated reforms of evidence law is sharply curtailed and the basic characteristics of the American litigation system receive little attention.

A more useful conceptual scheme might view evidentiary law as a subset of the law of trials. In addition to viewing evidence in light of the adversarial and jury systems, other scholars—such as proceduralists who are expert in the discovery rules—would be encouraged to consider how

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James and Hazard's highly respected treatise *Civil Procedure* is typical in its treatment of the basics of the American litigation system. Fewer than five of the treatise's nearly 800 pages discuss the adversary system, despite the fact that the authors describe it as one of the "leading characterstic[s] of the Anglo-American procedural system." FLEMING JAMES, JR. & GEOFFREY C. HAZARD, JR., CIVIL PROCEDURE 4 (3d ed. 1985). The treatise enumerates two significant criticisms levelled against the adversary system—the often counterfactual presumptions that the parties have equal opportunities to develop and present their positions and that the parties will be substantially honest. The treatise's authors answer these profound criticisms by praising a mere tinkering of the system—the "tendency of modern American procedure['s movement] away from the extreme position which would render the judge a passive umpire," *id.* at 7,—rather than undertaking a serious inquiry regarding the adoption of additional inquisitorial elements into our procedural system. In their chapter on the jury system, the authors devote *no* attention to the demerits of the jury. *See id.* at 409-58.

Similarly, while some scholarly attention has been given to the scope of the jury right in particular statutory contexts, *see, e.g.*, S. Elizabeth Gibson, *Jury Trials in Bankruptcy: Obeying the Commands of Article III and the Seventh Amendment*, 72 MINN. L. REV. 967 (1988), little study has been given to the jury system in general. About a half-dozen works exhaust nearly the entire field of study during the last forty years. *See* JEROME FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE (1949); CHARLES W. JOINER, CIVIL JUSTICE AND THE JURY (1962); THE JURY SYSTEM IN AMERICA: A CRITICAL OVERVIEW (Rita J. Simon ed., 1975); HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY (1966); Dale W. Broeder, *The Functions of the Jury: Facts or Fictions*, 21 U. CHI. L. REV. 386 (1953); Phoebe A. Haddon, *Rethinking the Jury*, 3 WM. & MARY BILL OF RIGHTS J. 29 (1994). As the discussion below suggests, such scholarly inattentiveness cannot be attributed to the fact that all has been "figured out" in this field.

345. *See* WIGMORE, supra note 36, § 6.5, at 457-58 (suggesting that "the limited scope of evidentiary reform attempted by the proponents of codification" is due to the codifiers' acceptance of the adversary system, and criticizing the codifiers' acceptance of the adversary system without "consider[ing] and justify[ing] the proposition that the maintenance of an adversary system expressively serves the interests of the public as well as of lawyers").

their "field" interacts with the rules of evidence.[346] Analysis of the evidentiary rules, and other procedural aspects of the litigation system that define American procedural justice, would then be undertaken in a context that permitted real reform.

The potential impediment to substantial reform of the litigation system posed by codification is not just a matter of theoretical concern. Significant reform of aspects as (apparently) fundamental as the adversarial and jury systems are not incompatible with the basic Anglo-American jurisprudential spirit. Evidence that our procedural system could be reshaped into one with a far different adversarial complexion than exists presently is that there have been, and still are, substantial so-called inquisitorial elements in Anglo-American procedural jurisprudence.[347] For example, criminal and civil litigation in pre-nineteenth century England was predominantly nonadversarial in character and closely resembled the contemporary European inquisitorial model.[348] Further, and closer to home, many Article I courts, which

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346. A moment's consideration brings to mind the reciprocal relationship between discovery and evidence law. The practical effects of the transition from the seventeenth century's "best evidence" approach, which severely limited the quantum of data permitted to be entered into evidence, *see infra* note 473, to the nineteenth century evidentiary regime, which allowed considerably more data into evidence, were constrained by the nineteenth century pleading system, which allowed only a limited amount of discovery. *See* JAMES & HAZARD, *supra* note 344, § 5.1, at 223-27. In short, limited discovery meant finite amounts of data. The significant later expansion in discovery allowed to the parties under the Federal Rules of Civil Procedure, *see* § 5.2, at 227-30, swelled the amount of information in the hands of lawyers and thereby the amount available to be offered into evidence. Additionally, the evidentiary rules' broad conception of relevance augmented the scope of what was conceived as being an appropriate discovery request.

Although this is not the place for an extensive treatment of discovery, it bears mention that the current discovery regime is neither inevitable (witness the pre-FED. R. CIV. P. regime) nor desirable. For example, criminal law utilizes a far more strict discovery system, notwithstanding the greater stakes (freedom). *See* Michael R. Gervasio & C. Brendan Johnson, Comment, *Criminal Law Project*, 82 GEO. L.J. 878, 878-907 (1994) (detailing rules of discovery in criminal trials).

347. I will use the term "inquisitorial," though it is rife with pejorative connotations, and pray that the reader will disgard the term's connotations and instead concern herself with its denotative meaning: a procedural system vesting power to fact-find and otherwise develop the case to a neutral third party rather than to the interested parties.

348. *See* Stephan Landsman, *The Rise of the Contentious Spirit: Adversary Procedure in Eighteenth Century England*, 75 CORNELL L. REV. 497, 499-500 (1990).

Not until "the eighteenth century [did the British] criminal procedure under[go] its epochal transformation from a predominantly nonadversarial system to an identifiably adversarial one," John H. Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources*, 50 U. CHI. L. REV. 1, 123 (1983); *see* Landsman, *supra* note 338, at 1149-57, before which time "[f]ew rules of evidence or procedure cabined

oversee a significant amount of litigation, vest considerable discretion in the administrative and bankruptcy judges, and share other characteristics with the inquisitorial model of dispute resolution.[349] Moreover, even under the current rules of evidence, an Article III judge may appoint an expert witness, examine such a witness himself, and then inform the jury that the witness was court-appointed.[350] Such actions undercut jury concerns of witness partiality, and thereby augment a witness's probative value and potentially "transform a trial by jury into a trial by [court-appointed] witness."[351] Past and current presence of substantial inquisitorial elements shows that diminishing the adversarial character of the American procedural system would not be per se incompatible with the Anglo-American juridical spirit. This is true because our current procedural system is more accurately characterized as being located at a certain point on an adversarial-inquisitorial continuum rather than as a pure adversarial system. When viewed as such, it becomes apparent that moving to a different point on the continuum between adversarialism and inquisitorialness is highly plausible. To the extent that codfication's

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judicial activity at trial." *Id.* at 1150. It was only during the latter part of the eighteenth and the nineteenth centuries, when the adversarial judicial process developed, *see* Landsman, *supra*, at 504-91, that the laws of procedure—including many of the evidentiary rules that are the direct ancestors of the Federal Rules of Evidence—developed to accommodate the new legal system. *See* Landsman, *supra* note 338, at 1150-51.

349. For example, even while operating in an adjudicative capacity, administrative agency officials may engage in informal ex parte communications with companies to learn about the basic characteristics of the bodies they regulate and to gather information so that a position on broad policy matters impacting a given adjudication can be developed. *See, e.g.*, Louisiana Ass'n of Indep. Producers v. FERC, 958 F.2d 1101, 1113 (D.C. Cir. 1992); *see also* 1 DAVIS & PIERCE, *supra* note 342, at 390-92. Also, administrative agencies, by and large, are permitted to hear and rely on hearsay to support their findings of adjudicatory facts. *See* Richardson v. Perales, 402 U.S. 389 (1971). Further, similar to German judges, administrative judges are viewed as experts within the fields they adjudicate. This rationale supports added deference. *Compare* Langbein, *supra* note 344 *with* 2 DAVID & PIERCE, *supra* note 342, at 119-20 (justifying the abandonment of exclusionary evidence rules on the basis of administrative law judges' expertise).

Similarly, bankruptcy courts are vested with, and exercise, significant proactive powers more characteristic of the active inquisitorial judge than the prototypcially passive adversarial judge. For example, beyond merely hearing bilateral disputes, bankruptcy judges are empowered to confirm plans of reorganization, approve the use or lease of the bankrupt's properties, approve certain sales of such properties and oversee the liquidation of the bankrupt's assets. *See* 28 U.S.C. § 157(b)(2)(L)-(O) (1988).

350. *See* FED. R. EVID. 706(a), (c) ("The court . . . may appoint expert witnesses of its own selection . . . [and] the court may authorize disclosure to the jury of the fact that the court appointed the expert witness."); *see also* FED. R. EVID. 614 ("The court may . . . call witnesses [and] may interrogate witnesses, whether called by itself or by a party.").

351. Kian v. Mirro Aluminum Co., 88 F.R.D. 351, 356 (E.D. Mich. 1980).

bureacratization effect conceals this possibility, the code has inhibited real opportunities for change.

Similarly, it would be possible to reshape America's litigation system into one with a very different balance between jury and non-jury trials than the present. The Seventh Amendment of the United States Constitution poses no barrier to significantly expanding the scope of nonjury trials. That Amendment is formulated in historical terms that *preserve* the right to the jury,[352] and thus the amendment does not apply to what were suits in equity in 1791.[353] Nor does the Seventh Amendment by its terms apply to rights and remedies that came into existence after 1791 (which, of course, occupy the bulk of contemporary litigation). The Supreme Court's "public rights" test for determining when Congress may place the adjudication of new federal rights in non-jury fora[354] has proven to be a malleable standard that has permitted many "causes of action that are closely *analogous* to common-law claims [to be placed] beyond the ambit of the Seventh Amendment."[355] Additionally, legislatures are permitted under current Seventh Amendment jurisprudence to abolish common law remedies for which juries were available and to substitute administrative schemes not providing for jury trials.[356] When the legislature is silent as to whether a new right carries with it the the right to a jury, courts generally utilize a "historical" test to analogize the new right to rights in existence at the time of the passage

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352. The Seventh Amendment provides: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be pre-served . . . ." U.S. CONST. amend. VII.

353. *See* Dimick v. Schiedt, 293 U.S. 474, 476 (1935); Parsons v. Bedford-U.S. (3 Pet.) 433, 447 (1830).

354. *See* Granfinanciera, S. A. v. Nordberg, 492 U.S. 33, 51 (1988) (deciding that "Congress' power to block application of the Seventh Amendment to a cause of action has limits. Congress may only deny trials by jury in actions at law, we said, in cases where 'public rights' are litigated") (citing Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n, 430 U.S. 442, 455 (1977)).

355. *Granfinanciera*, 492 U.S. at 52 (emphasis in original).

356. Federal bankruptcy law offers an excellent example of congressional determination that a large class of actions traditionally entitled to jury trial should now be tried without jury. *See, e.g.*, Langenkamp v. Culp, 498 U.S. 42, 44-45 (1990) (determining that by filing a claim against a bankruptcy estate a party subjects himself to the bankruptcy court's equitable jurisdiction and loses the Seventh Amendment right to a jury trial for those related claims for which he otherwise would have been entitled to a jury). Stripping the right to a jury trial is not limited to the context of bankruptcy. *See, e.g.*, Mountain Timber Co. v. Washington, 243 U.S. 219 (1917) (permitting abolition of common law right for servant to bring negligence action against his master, where a new compensation system was put in place).

of the Seventh Amendment.[357] Thus, even under current Seventh Amendment jurisprudence, "public rights" and substitute administrative schemes offer considerable space for accommodating an expansion of nonjury substantive rights. There is ample room for scholarly exploration of how and when these doctrinal categories could be employed to expand the scope of nonjury trials.

There also is considerable room for scholars to help reshape Seventh Amendment doctrine. All the above tests are extraordinarily inexact.[358] Scrutiny of the cases reveals that the Court has offered justifications which proceed almost uniformly by reference to abstract legal categories (legal/equitable; private/public; new/historically analogous) rather than with an analysis of the strengths and liabilities of the jury system itself. While the "legal/equitable" distinction inheres in the text of the Seventh Amendment itself, the other doctrinal tests are Court-produced glosses whose questionable predictive efficacy throws doubt on their merit. Doctrinal Seventh Amendment disarray may be attributable to the Court's failure to connect doctrine to reality. This, in turn, is probably tied to the dearth of scholarly attention that has been paid to the jury system, which may very well be a byproduct of bureaucratization.

In short, by codifying evidence law as a distinct field, the Federal Rules of Evidence disguises the fact that the evidentiary rules in large part are a function of the more basic procedural charcteristics of adversarialism and the jury. Evidence scholars have been led to take as a given the law that is most determinative of their field of expertise, limiting scholarly imagination and constraining the scope of contemplated evidentiary possibilities. Further, evidence scholars have been distracted from turning their attention to contemplate the basic aspects of the American procedural system, as apparently have other scholars (perhaps due to the presence of another code, the Federal Rules of Civil Procedure). Since reshaping basic aspects of the American litigation

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357. *See Granfinanciera*, 492 U.S. at 42 ("The form of our analysis is familiar. First, we compare the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity. Second, we examine the remedy sought and determine whether it is legal or equitable in nature.") (quoting Tull v. United States, 481 U.S. 412, 417-18 (1983)); *see also* Curtis v. Loether, 415 U.S. 189, 193 (1974).

358. *Granfinanciera* exemplifies the indefiniteness of the "private/public" rights dichotomy. *See Granfinanciera*, 492 U.S. at 55 ("Although the issue admits of some debate, a bankruptcy trustee's right to recover a fraudulent conveyance . . . seems to us more accurately characterized as a private rather than a public right."). The "historical test" utilized in the face of congressional silence is similarly open-ended. Nor is the "legal/equitable" distinction—the threshold inquiry for Seventh Amendment purposes, *see Curtis*, 415 U.S. at 193—without considerable ambiguity. *See Granfinanciera*, 492 U.S. at 47-49.

system is not a mere project for scholarly revolutionaries but could be undertaken by working with current doctrines and practices, the bureacratization of law caused by codification not only has concealed and impoverished discourse about, but may very well have inhibited reform of, these fundamental attributes of America's system of legal procedure.

### *B. Organizational Scheme*

Although it would be possible to codify simply by providing a list of rules, all American codes have sought to arrange their rules in a logical format in accordance with some organizing principles. The chosen organizational scheme inevitably emphasizes some policy concerns and downplays others. In this sense, the very act of imposing a logical structure distorts the complex reality that the law mediates.[359] As a corollary, the dangers of simultaneous over- and under-emphasis are directly proportional to the complexity of the concerns that come together in the doctrinal field. This sub-part will examine the consequences of the chosen organizational scheme upon the post-code application of the Federal Rules of Evidence and the Model Penal Code.

#### 1. THE FEDERAL RULES OF EVIDENCE

The Federal Rules of Evidence offer one example of the heuristic power, and corresponding dangers, of organizational schemes. The organizing principle of the Federal Rules of Evidence is admissibility.[360] Not coincidentally, the bulk of attention courts and scholars pay to evidence concerns threshold determinations of admissibility and exclusion.[361] The organizing principle of admissibility, however, marginalizes a highly significant issue that is in the background of all evidence law: the division of responsibilities between judge and jury.

The rules governing the relationship between judge and jury at first blush appear to be apportioned to Rules 104 (Preliminary Questions), 201

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359. *Cf.* Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 205, 215 (1979) (noting that categorical schemes "cabin and distort our immediate experience, and they do so systematically rather than randomly"). While categorical schemes are present even in uncodified common law, *id.*, a historical overview of American legal thought illustrates the fluidity of such schemes; for example, today we do not think of common law in accordance with the scheme sketched out by Blackstone. The categorical schemes generated by codes, by contrast, may have a stronger power to coagulate legal thought, since the code's scheme, unlike the treatise writer's scheme, is legally authoritative.

360. *See* Allen, *supra* note 325, at 1084-85; discussion *supra* note 325.

361. *See supra* note 329.

(Judicial Notice of Adjudicative Facts), and 301 (Presumptions in General in Civil Actions and Proceedings). In an important article, Professor Ronald Allen shows that the drafters' efforts to relegate the law governing the relationship between judge and jury to three discrete rules were bound to be, and indeed have been, unsuccessful. Inconsistencies within and among the Code's rules are a result of the framers' inattentiveness to the division of power between judge and jury, a concern whose implications are found in nearly all the rules.[362] Continuing confusion concerning these rules is a testament to the heuristic powers of organizational schemes: most legalists are not conscious of the entirety of the governing principles which, once understood, provide guidance as to how a multitude of conundrums can be resolved.[363] Professor Allen further suggests an organizational scheme of evidence law based on the judge-jury relationship.[364]

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362. For example, Rule 104 provides two different standards under which the judge is to determine whether to allow evidence before the jury. Allen, *supra* note 325, at 1086. Under the first standard, preliminary questions concerning the qualification of a person to be a witness or the admissibility of evidence generally "shall be determined by the court." FED. R. EVID. 104. Under the second standard, which is operative only "[w]hen the relevancy of evidence depends upon the fulfillment of a condition of fact," the evidence is to be admitted "upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition." *Id.* Professor Allen shows, however, that Rule 104 interfaces poorly with the other evidentiary rules. For example, Rule 703 provides that an expert may testify on the basis of facts or data "reasonably relied upon by experts in the particular field" even if "the facts and data [are] not . . . admissible in evidence." FED. R. EVID. 703. Which of the two standards under Rule 104 applies to the determination of reasonableness? While strong arguments can be made on behalf of the applicability of each of Rule 104's standards, "[w]hichever is the best view, the Rules are not much help where they should be, and could have been, had the drafters used as an organizing principle the judge-jury relationship." Allen, *supra* note 325, at 1089. Similar ambiguities can be found in Rule 104's relationship to all the relevancy rules in Article IV. *Id.* at 1087.

Inattentiveness to the judge-jury relationship helps to explain other oddities in the evidence Code. For example, under Rule 602 a witness (other than an expert witness) will be permitted to testify only if he has personal knowledge of the matter. That Rule specifies that the 104(b) standard is to be used, requiring that evidence be introduced that is "sufficient to support a finding that he has personal knowledge." FED. R. EVID. 602. By contrast, Rule 702, which concerns the admission of expert testimony, does not specify the applicable standard and, in fact, appears to trigger Rule 104(a)'s standard. This double lack of parallelism in the witness rules is curious. "Once again, the reason may be that the real issue presented by these examples—the appropriate judge-jury relationship—is not what was of paramount importance in the drafting process." Allen, *supra* note 325, at 1088. Professor Allen persuasively argues that other ambiguities and oddities found across the Code also are attributable to inattention to the judge-jury relationship. *See id.* at 1086-94.

363. *See* Allen, *supra* note 325, at 1094-96.

364. *Id.*

That American evidentiary rules can be arrayed according to the balance of power between judge and jury does not mean, however, that this policy principle would have been *the* appropriate organizational scheme. As Professor Allen perceptively observes, "other organizing principles than the judge-jury relationship" also can usefully order evidentiary rules.[365] The variety of useful organizational schemes is a manifestation of the many policy concerns that are simultaneously operative within evidence law. There is a certain arbitrariness to whichever organizational scheme is chosen. When the law is codified, however, *one* organizational scheme is unavoidably chosen and risks becoming viewed as *the* appropriate scheme.

### 2. THE MODEL PENAL CODE

The Model Penal Code also illustrates the heuristic power of any chosen organizational scheme. Parts I and II of the Code, which contain the "traditional" criminal law detailing for what acts and under what conditions persons may be criminally liable, are organized in accordance with the distinction between offenses and defenses.[366] In an intriguing recent article, Professor Paul H. Robinson suggests that the criminal law has three primary functions and argues that "the current organizing structure of criminal law uses distinctions that obscure the law's different functions."[367] More specifically, criminal law, according to Professor Robinson, must (1) define rules of conduct ("rule articulation"), (2) set the conditions under which the law's violation merits liability ("liability assignment"), and (3) determine the degree of blameworthiness and consequent quantum of punishment ("grading").[368] Robinson argues that significant doctrinal confusion exists because the current organizational scheme masks these three objectives.[369] He then suggests that these three functions are the principles according to which criminal law could be reorganized.[370]

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365. *Id.* at 1095 & n.35 (suggesting that "[l]ogical relevancy is one possible [alternative] dimension of analysis").

366. Offenses are found in Part II ("Definition of Specific Crimes") and the defenses are found in Part I ("General Provisions"). *See* Paul H. Robinson, *A Functional Analysis of Criminal Law*, 88 NW. U. L. REV. 857, 858-59 (1994).

367. *Id.* at 858.

368. *Id.* at 857.

369. *See, e.g., id.* at 880-82 (noting confusion resulting from MODEL PENAL CODE § 3.07(1)'s combination of justification, which functions to identify rules of conduct, with the actor's subjective belief, which determines liability); *id.* at 882-89 (similar problems with MODEL PENAL CODE § 2.02(2)(c)-(d)).

370. *See id.* at 911-12.

There is a significant parallel between Professor Allen's and Professor Robinson's approaches. Both scholars seek to (1) identify the chosen organizational scheme that structures the codification of their areas of doctrinal interest, (2) mark other concerns operative in the doctrinal area that are camouflaged by the chosen organizational scheme, (3) note problems in the law that have resulted from the legal community's having ignored the other concerns, and (4) suggest a reorganization of the doctrine that would bring attention to the appropriate governing principles. In short, both articles are responses to the heuristic power of codes' organizational schemes.

#### 3. A BRIEF CONCLUSORY NOTE REGARDING ORGANIZATIONAL SCHEMES

The multiplicity of useful organizational schemes is a reflection of the variety of competing policy concerns that come to meet in the doctrinal fields of evidence and criminal law. Other doctrinal categories, like contract, are less polycentric. Such doctrinal areas therefore are less prone to the potential for obscuring policy concerns inherent in adopting a single organizational scheme. In other words, the precise jurisprudential consequences of codifying turn on the characteristics of the doctrinal field.

### *C. Spirit*

This section will explore the animating "spirits" that underlie three significant codes. Each spirit constitutes a nonaxiomatic approach to the doctrinal field that directs subsequent development of the law and socializes legalists and laypersons in specific ways. Examined seriatim will be the animating spirits, and their associated consequences, in Article 2 of the Uniform Commercial Code, the Federal Rules of Evidence, and the Model Penal Code.

#### 1. THE UNIFORM COMMERCIAL CODE

In this sub-part I will first identify three plausible theories of how contractual obligations are created and examine the philosophical womb out of which each grows. Second, 1 will identify the approach to obligation creation adopted by the Uniform Commercial Code—that is to say, the UCC's "spirit"—showing that the Uniform Commercial Code elevated one approach as it significantly marginalized the two alternatives. Third, I will show that, consistent with the Code, the two alternative approaches have been severely marginalized in practice since the Code's adoption. Fourth, I will argue that the marginalization of the alternatives is attributable to the Code and not to other causes.

### *a. Three Possible Approaches to Contract and Their Philosophical Underpinnings*

Contract concerns duties created between parties apart from the general duties imposed by tort and so-called public law. There are three plausible approaches to obligation creation that can be found in the pre-Code common law. First, the law could choose to enforce those obligations that individuals agree to impose upon themselves,[371] what might be labeled an "Agreement" theory of obligation creation.[372] Second, the law could premise contractual obligation on the substantive fairness of an exchange,[373] a "Substantive Fairness" approach to obligation creation. Third, the law could impose contractual obligations when a party has incurred another's reasonable detrimental reliance through actions or words.[374] Let this be labelled the "Reliance"

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371. *Cf.* Kleinschmidt Div. of S.C.M. Corp. v. Futuronics, 41 N.Y.2d 972 (1977) ("Without agreement there can be no contract . . . . This principle, basic as it is to contract law, finds explicit recognition in the . . . Code.").

372. Holmes' bargain theory and the approach to contract Williston adopts in the First Restatement of Contracts, *see* GILMORE, *supra* note 317, at 20-34, belong to the Agreement theory of obligation creation, as I have defined that approach. Searching for "reciprocal conventional inducement" as evidenced by "consideration" was a tool for determining when parties had intended to create contractual obligations. In § 2-204(a), the U.C.C. abandoned the Restatement's formalistic tests in favor of "realistic" standards, but both the Restatement and the U.C.C. were ultimately searching for the same thing: voluntarily assumed obligations.

373. For documentation of the Substantive Fairness approach to contractual liability prior to the mid-nineteenth century, *see* HORWITZ, *supra* note 58, at 164-67 (arguing that courts policed the substantive fairness of the exchange through doctrines such as consideration, under which courts found a contract to be binding only if there had been an exchange of sufficient value); *see also* Horwitz, *supra* note 315. *But see* Patrick Atiyah, *The Move from Agreement to Reliance in English Law and the Exclusion of Liability Relating to Defective Goods*, *in* CONTRACT LAW TODAY: ANGLO-FRENCH COMPARISONS, *supra* note 25, at 28 (arguing that the value of fairness in contract did not emerge until after 1870, before which contract law incorporated a nearly unadulterated ethic of freedom of contract); A.W. Simpson, *The Horwitz Thesis and the History of Contracts*, 46 U. CHI. L. REV. 533 (1979) (challenging Horwitz's thesis that Substantive Fairness had been the dominant approach to contract).

For the purposes of this Article, the degree to which Substantive Fairness was, as a historical matter, *the* paradigm of contract is of secondary importance to the fact that it is an approach to obligation creation that existed in the common law. What is important is that the Substantive Fairness approach has not been significantly doctrinally developed over the last 75 years, during which time societal concerns of fairness have been growing and the nineteenth-century laissez-faire ethic has waned.

374. *See* GILMORE, *supra* note 317, at 63-64 (noting that "[g]oing back into the past, there was an indefinite number of cases which had imposed liability, in the name of consideration, where nothing like Holmes's 'reciprocal conventional inducement' was anywhere in sight" but instead had come to the aid "of a plaintiff who had, to his

approach to obligation creation. The choice among the three competing approaches is significant. The various theories of obligation creation—the Agreement, Reliance, and Substantive Fairness theories—are more than mere rules that facilitate business exchanges. These theories of contract provide the paradigms of how and when extra-tort duties between persons are created. The theories' role as paradigms is of key importance. Generally, business persons, like other people, are not informed as to the nuances of legal doctrines. Instead, business persons govern their behavior in accordance with certain "loadstar" intuitions. It is the intuition as to what circumstances create obligations vis-à-vis others—an intuition informed in large part by the paradigm of contract—that is of central import to much of a person's behavior in relation to "strangers."

Because the paradigm of contract is a significant determinant of citizens' behaviors toward others, the various theories of obligation creation should be viewed in the larger philosophical context of persons' relationships to others, and the appropriate role of the state (through its laws) in bringing about desired social behaviors. When analyzed in such terms, it becomes clear that each of the three approaches to obligation creation is premised on a different set of nonaxiomatic beliefs about the nature of people and the appropriate roles of community, law, and the state. The differing assumptions underlying the three approaches can be brought into focus by exploring the behavioral patterns each assumes and encourages. The point here is not to exhaustively detail competing perspectives on the relationship between personhood and the state, and to then vindicate one. For the purposes of this Article, it will suffice to demonstrate that the animating spirit adopted in Article 2 of the Uniform Commercial Code (and in other codifications, as we soon shall see) is an outgrowth of only *one* of several answers to this ultimately metaphysical conundrum.

At the core of the Agreement theory is an atomistic philosophy, which posits that people are presumptively responsible to no one. The

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detriment, relied on a defendant's assurances without the protection of a formal contract"); *see also* ATIYAH, *supra* note 151, at 79-91; PATRICK S. ATIYAH, PROMISES, MORALS AND LAW 66-68, 202-15 (1981); 1A ARTHUR L. CORBIN, CORBIN ON CONTRACTS §§ 193-209, at 187-271 (1963) (collecting cases and describing the recurring factual patterns where courts premised contractual liability on reliance); Atiyah, *supra* note 373; Lon Fuller & William R. Perdue, *The Reliance Interest in Contract Damages*, 46 YALE L.J. 52, 61 (1936) (arguing that the law protected "expectancies created by words or conduct"). *See generally* Jay M. Feinman, *Promissory Estoppel and Judicial Method*, 97 HARV. L. REV. 678 (1984) (arguing that promissory estoppel embodies an approach to contract that is at odds with the classical nineteenth-century understanding of contract).

contractual implications of autonomy are limited duties and liability.[375] Obligation vis-à-vis others is fundamentally a function of what one wills. Because the duty to deal with others in good faith arises only *after* a contract has come into existence, people are invited to bargain hard and misrepresent in interactions outside the home.[376]

The Agreement theory's presumption of the autonomy and independence of the contracting parties rests on particular antecedent theories of personhood and (relatedly) the state that can be subject to multiple critiques. Examining these critiques clarifies the philosophical ground upon which the Agreement theory stands, and also brings into focus the foundations that undergird the Substantive Fairness and Reliance approaches. Most fundamentally, the Agreement theory stands on the assumption that the individual is the appropriate elemental unit of analysis when determining a person's responsibilities, a position that might be labelled "atomism." Atomism is a hotly contested perspective, however, on a subject matter that unavoidably implicates metaphysical/theological issues. Perhaps the best known secular competitor to atomism is the Marxist conception of humankind as a "species-being."[377] Under this view, the quality of a person's life is wholly dependent upon the nature of communal life. The community therefore becomes the elemental unit of analysis when determining policy.

To reject Marxism is not necessarily to embrace the Agreement theory. One alternative is provided by the monotheistic traditions of Judaism and Islam. Under each, interpersonal responsibilities are viewed as this-worldly expressions of the ultimately interconnected nature of reality that is implicit in monotheism, according to which the entirety of the universe is the creation of a single Supreme Being.[378] Relatedly, achieving the ultimate goal toward which persons are to strive—"salvation" variously defined—is viewed as depending not only on an individual's actions, but on the behavior of the entire community. Under both systems, therefore, law's consequences vis-à-vis individual

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375. *Cf.* Jay M. Feinman, *The Last Promissory Estoppel Article*, 61 FORDHAM L. REV. 303, 312 (1992).

376. The good faith requirement that is incorporated into the Uniform Commercial Code does not demand good faith during bargaining and negotiation. *See* E. Allan Farnsworth, *Precontractual Liability and Preliminary Arguments: Fair Dealings and Failed Negotiations*, COLUM. L. REV. 217, 239 & n.83 (1987); *supra* note 242. Only a few courts, in particularly egregious circumstances, have imputed liability due to a party's conduct during negotiation. *See Farnsworth*, *supra*, at 232-36; G. Richard Shell, *Substituting Ethical Standards for Common Law Rules in Commerical Cases: An Emerging Statutory Trend*, 82 NW. U. L. REV. 1182, 1198 & n.7 (1988) (collecting several cases).

377. *See* Karl Marx, *On the Jewish Question*, *in* THE MARX-ENGELS READER 26, 35 (Robert C. Tucker trans. & ed., 1978).

378. MAHARAL, NETIVOT HA'OLAM (Jewish thought).

character and communal good will are central components of the policy decisionmaking calculus lurking behind the chosen legal regime.

Other alternatives to both the Agreement theory and Marxism can be found in Western political and legal traditions. Under the view of Aristotle, for example, "[i]t is . . . for the sake of good actions, and not for the sake of social life, that political associations must be considered to exist."[379] Facilitating economic exchange and providing its citizens protection are necessary qualities of a state, "[b]ut it is the cardinal issue of goodness or badness in the life of the polis" that is the central definer of a state. Otherwise "a political association sinks into a mere alliance . . . [and] law becomes a mere covenant . . . instead of being, as it should be, a rule of life such as will make the members of a polis good and just."[380] Under this view, the society's laws governing extra-household behaviors are vital determinants of a person's being. Closer to home, it has been argued that a so-called altruist tendency in American legal practice has always coexisted with the individualist ethic found in the Agreement theory.[381] The theory of personhood undergirding altruism embraces an ethic of sharing and sacrifice that emerges from a metaphysical postulate of human solidarity,[382] according to which people have duties to "others," and the hardships or happiness experienced by "others" directly influence one's own life. In this sense, the "self/other" dichotomy is an interpretive framework that distorts ultimate reality. Adherents of contemporary communitarian thought offer a similar critique of the self/other bifurcation that has relevance to private law.[383]

This brief overview of competing approaches to human needs and the role of the state sheds light on the philosphical foundations of a Reliance approach to contractual obligation. Under Reliance, the actual effects of one's words and actions vis-à-vis others, independent of one's intention, is determinative. Such a doctrinal approach to contractual responsibility could be expected to deter misrepresentation and dissembling. More

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379. THE POLITICS OF ARISTOTLE § 1281(a) (Ernest Barker trans. & ed., 1958).

380. *Id.* § 1280(b).

381. *See* Kennedy, *supra* note 139, at 1718-22, 1725-37.

382. *See id.* at 1717-18.

383. Most communitarian scholarly attention has been focused on "public" (especially constitutional) rather than "private" law. *See, e.g.*, Robert Post, *Tradition, the Self, and Substantive Due Process: A Comment on Michael Sandel*, 77 CALIF. L. REV. 553 (1989). This is curious, for the private law is probably at least as significant in shaping the character of the social fabric of society since it governs people's everyday interactions. More recently, increased attention has been paid to communitarianism's implications vis-à-vis private law. *See, e.g.*, Thomas Donaldson & Thomas W. Dunfee, Integrative Social Contracts Theory: A Communitarian Conception of Economic Ethics (Working Paper, Ref. No. 93-2-170, Department of Legal Studies, The Wharton School of the University of Pennsylvania).

honesty in business dealings could be expected to help foster community good will. A Reliance approach, furthermore, would lead people to more carefully consider the impact of their words and actions upon others—since creating reasonably foreseeable expectations in others could be costly. In so doing, a Reliance approach could be expected to sensitize people to looking beyond themselves. Clearly, the desirability of such outcomes is a product of one's antecedent philosophy concerning human nature and the role of the state.

The Substantive Fairness approach bears a family resemblance to the Reliance approach, in that both incorporate an ethic of interconnection and interpersonal responsibility far deeper than found in the Agreement approach. Predicating contractual enforcement on substantive fairness encourages those with superior resources to bargain fairly and to refrain from pressing the advantages that generally accompany strength. This could be expected to generate feelings of good will and trust. Also, the Substantive Fairness approach is associated with the theory that the judicial system must be a "fair" institution.[384]

In short, each of the three approaches to contracts—the Agreement theory, Substantive Fairness, and Reliance—rests on antecedent assumptions concerning the nature of people and community and upon a political theory regarding the appropriate role of the state. And each paradigm offers a unique intuitive loadstar that guides individuals' behavior with others.

*b. Article 2's Embodiment of the Spirit of the Agreement Theory*

The Agreement theory pervades Article 2's rules governing whether a promise is enforceable and how it is to be construed.[385] The U.C.C. defines "Contract" as the "total legal obligation which results from the parties' *agreement*."[386] Section 2-204(1), dubbed "Formation in General," states that "a contract for the sale of goods may be made in any

384. *See, e.g.*, Cliterhall v. Ogilvie, 1 S.C. Eq. (1 Des.) 250, 259 (1792) ("It would be a great mischief to the community, and a reproach to the justice of the country, if contracts of very great inequality, obtained by . . . the skillful management of intelligent men, from weakness, or inexperience . . . could not be examined into, and set aside."), *quoted in* HORWITZ, *supra* note 58, at 164-65.

385. *See* PERMANENT EDITORIAL BOARD, *supra* note 133, at 11; Michael Gibson, *Promissory Estoppel, Article 2 of the U.C.C., and the Restatement (Third) of Contracts*, IOWA L. REV. 659, 677-705 (1988); Eugene F. Mooney, *Old Kontract Principles and Karl's New Kode: An Essay on the Jurisprudence of Our New Commercial Law*, 11 VILL. L. REV. 213, 220-21 (1966); Murray, *supra* note 26, at 4-5, 20 (concluding that Article 2 employs an Agreement theory of contracts).

386. U.C.C. § 1-201(11) (emphasis added).

manner sufficient to show agreement,"[387] where agreement is defined in section 1-201(3) as "the bargain of the parties in fact."[388] And, under section 2-204(3), a contract will be found if, *inter alia*, "the parties *have intended* to make a contract."[389] Consistent with the Agreement theory, the Code permits parties to contract around almost all of its default rules. Moreover, some of the doctrinal apparatuses employed in Article 2, such as offer and acceptance in section 2-206, only make sense within an Agreement theory approach to contracts. The Code's relaxed requirements in that section are designed to ensure that technical formalities do not block enforcement of the parties' agreement.[390] Similarly, the liberal rules governing parol evidence are geared toward allowing courts to discover the "true understanding of the parties."[391]

Many other substantive rules found in Article 2 also would not be relevant, or would hinge on different facts, had one of the alternative approaches to contracts been chosen.[392] And several rules appear to have been deliberately drafted to solve problems that courts had remedied earlier through promissory estoppel, thereby undercutting Reliance's applicability and reinforcing the Agreement theory's centrality.[393] Finally, even those rules that could fit under two or three of the contract models have adopted a flavor characteristic of the Agreement theory.[394]

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387. *Id.* § 2-204(1).

388. *Id.* § 1-201(3).

389. *Id.* § 2-204(3) (emphasis added).

390. *See* Murray, *supra* note 26, at 6.

391. U.C.C. § 2-202 comment 2; *see* Murray, *supra* note 26, at 16.

392. *See, e.g.*, U.C.C. § 2-202 (governing the terms "which are otherwise set forth in a writing intended by the parties as a *final expression of their agreement* . . . ."); § 2-204(3) (providing that "even though one or more terms are left open a contract for sale does not fail for indefiniteness *if the parties have intended to make a contract*") (emphasis added); *id.* § 2-210 (providing that a "party may perform his duty through a delegate *unless otherwise agreed*") (emphasis added); *id.* § 2-307 (imposing obligation to tender goods in a single delivery "[u]nless otherwise agreed").

393. *See* Gibson, *supra* note 385, at 685-704 (interpreting U.C.C. §§ 2-206, 2-201, and 2-205 as non-promissory resolutions to assorted pre-Code problems that had been remedied via reliance doctrines).

394. For example, U.C.C. § 2-313(2), which determines when an express warranty is created, states that "[i]t is not necessary to the creation of an express warranty that the seller . . . have a specific intention to make a warranty . . . ." Comment 8 of the official comments to the U.C.C. clarifies this, asserting that "the basic question remains[,] . . . [w]hat statements of the seller have in the circumstances and in objective judgment become part of the basis of the bargain?" U.C.C. § 2-313 cmt. 8.

Thus, the constructed warranty is justified in terms of agreement and bargain, *not* in terms of reliance or substantive fairness. The means of justifying the doctrine of constructive warrantics has consequences not only *vis-á-vis* the public's perception of its responsibilities with respect to others, but can also be expected to have substantive legal consequences. One can readily imagine a scenario where a constructed warranty

Interestingly, the alternative bases for creating contractual obligations—Reliance and Substantive Fairness—have not been wholly forsaken. An incarnate of the Substantive Fairness approach can be found in section 2-302, which permits courts to strike down contract terms or contracts as a whole that were unconscionable at the time of formation. Under section 1-103, promissory estoppel, which incorporates a Reliance approach to creating obligations, is still applicable unless displaced by particular Code provisions.

Nonetheless, both alternatives to the Agreement theory have been severely marginalized under the Code. Whereas nearly the entire doctrinal apparatus created by Article 2 operationalizes the Agreement approach, Substantive Fairness and Reliance are each relegated to isolated Code provisions. Further, each of these provisions operates as an equitable doctrine that is employed only when application of the "traditional" rules operationalizing the Agreement theory would result in untoward outcomes. For example, rather than requiring substantively fair exchanges, the Code's unconscionability provision functions only as a stopgap measure to avoid complete substantive *un*fairness: under its terms, section 2-302 is only triggered upon a court finding of unconscionability. In short, the alternatives to the Agreement theory have been legally, intellectually, and morally marginalized—they clean up the mess left by the Agreement theory and are not treated as coequal theories of obligation creation.

*c. The Post-Code Fate of the Alternatives to the Agreement Theory*

This sub-part will demonstrate that the marginalization of the alternatives to the Agreement theory built into the U.C.C. has been realized in post-Code caselaw. Examined first will be the post-Code fate of Reliance. Afterward, I will show what has become of Substantive Fairness.

(1) The Fate of Reliance

The post-Code fate of promissory estoppel shows that the marginalization of Reliance built into the U.C.C. has been realized in practice. Promissory estoppel is one of the enumerated extra-Code sources of "law and equity" that, under section 1-103, has continuing vitality under the Code, except where particularly displaced. In theory,

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contoured by an underlying theory of reliance or substantive fairness would provide relief, even though the seller did not make any "statements [that] in the circumstances and in objective judgment bec[a]me part of the basis of the bargain." *Id.*

therefore, courts have a solid legal basis for turning to promissory estoppel's reliance approach, as the Code only rarely particularly displaces law and equity.[395]

The empirical evidence shows, however, that Article 2's incorporation of its own jurisprudential antithesis in the form of reliance-based promissory estoppel has not had much practical significance. While it is not possible to show how often promissory estoppel would have been invoked absent the Code, it is notable how rarely promissory estoppel has been relied upon by recent courts in disputes governed by Article 2 of the Uniform Commercial Code: one recent study reported that between 1981 and 1988 state and federal courts decided cases on the basis of promissory estoppel in approximately only *forty* contract disputes governed by Article 2,[396] and there are many instances where courts have refused to award plaintiffs reasonable reliance.[397] In fact, over the thirty-six years since the Uniform Commercial Code was first promulgated, courts nationwide have invoked promissory estoppel in fewer than 200 Article 2 cases, and have found obligation creation in far fewer than 200 instances.[398] This constitutes a fraction of one percent of the decided contract cases.[399]

Even more suggestive of the waning influence of the Reliance theory of contractual obligation is the fact that promissory estoppel's "reliance" foundation has been eroded and promissory estoppel has been assimilated into the Agreement theory. This is most strikingly demonstrated by studying the fate of Restatement (Second) of Contracts section 90, the so-called "promissory estoppel" provision, which explicitly bases contractual obligation on a Reliance approach to obligation creation.[400] The

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395. *See supra* part III.B.2.a.

396. *See* Gibson, *supra* note 385, at 675.

397. *See, e.g.*, Cayuga Constr. Corp. v. Vanco Eng'g Co., 423 F. Supp. 1182, 1185 (W.D. Pa. 1976); D.R. Curtis Co. v. Mason, 649 P.2d 1232, 1234 (Idaho 1982); *see also* Gibson, *supra* note 385, at 684.

398. This is the result of a comprehensive search on WESTLAW conducted in June 1994 searching for "promissory estoppel," "detrimental reliance," and "reasonable reliance" in the ALLCASES database.

399. Some have suggested that several provisions of the U.C.C. function to protect a party's reliance interest. *See, e.g.*, Gibson, *supra* note 385, at 685-704 (interpreting U.C.C. §§ 2-206, 2-201, and 2-205 as solutions to problems that had been solved previously by resort to promissory estoppel). This suggestion does not undercut this Article's claim that reliance has been marginalized, for these Code provisions are styled as part of the Agreement theory and merely protect reliance interests in an ancillary manner. Consequently, the dangers of marginalizing the alternatives to which this Article points—that Agreement is the sole paradigm informing persons' loadstar intuitions, *see supra* p. 100—are unabated.

400. *See* RESTATEMENT (SECOND) OF CONTRACTS § 90 cmt. a (noting that § 90 "is often referred to in terms of 'promissory estoppel,'" a doctrine that "prevents a person from showing the truth contrary to a representation of fact made by him *after another has*

pertinent part of Section 90 states that "[a] promise which the promisor *should reasonably expect to induce action or forbearance* on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise."[401] Comment a identifies section 90's Reliance foundation as a "basic principle" that supported enforcement of informal contracts in actions of assumpsit, enforcement of half-completed exchanges and executory exchanges.[402] Consistent with its Reliance foundation, section 90 indicates that "[t]he remedy granted for breach may be limited as justice requires,"[403] which the illustrations and reporter's note suggest means that the appropriate measure of damages under section 90 is generally reliance damages, rather than full expectation damages.[404]

Notwithstanding section 90's explicit terms, however, the consensus among scholars is that section 90 has not generally been invoked by courts to protect the promisee's reliance,[405] but instead has been utilized

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*relied on the representation*") (emphasis added). *See generally* Charles L. Knapp, *Reliance in the Revised Restatement: The Proliferation of Promissory Estoppel*, 81 COLUM. L. REV. 52, 53 (1981) (describing § 90 as "perhaps the most radical and expansive development of this century in the law of promissory liability").

401. RESTATEMENT (SECOND) OF CONTRACTS § 90 (emphasis added).

402. *See id.*

403. *Id.*

404. *See id.* at 247; Edward Yorio & Steve Thel, *The Promissory Basis of Section 90*, 101 YALE L.J. 111, 137-47 (1991) (examining the five illustrations provided by the Second Restatement and the three cases listed in the reporter's note that demonstrate the appropriateness of partial relief, particularly reliance damages).

405. *See* Randy E. Barnett & Mary E. Becker, *Beyond Reliance: Promissory Estoppel, Contract Formalities, and Misrepresentations*, 15 HOFSTRA L. REV. 443, 447 (1987) (concluding that "reliance is not always *irrelevant* to liability under promissory estoppel" in the caselaw and suggesting that "reliance should not be the focal point of promissory estoppel discussions") (emphasis added); Daniel A. Farber & John H. Matheson, *Beyond Promissory Estoppel: Contract Law and the "Invisible Handshake,"* 903, 904-05, 945 (1985) (concluding that "reliance is no longer the key to promissory estoppel," but that promissory estoppel "has become a means of enforcing promises differing in doctrinal detail from traditional contract law but sharing a common goal"); Stanley D. Henderson, *Promissory Estoppel and Traditional Contract Doctrine*, 78 YALE L.J. 343, 348 (1969) (noting that "reliance is commonly seen as a tool for sorting out motives which bear on the issue of exchange" and that courts tend to "treat action in reliance as proof of bargain rather than as an independent basis of enforcement"); Juliet P. Kostritsky, *A New Theory of Assent-Based Liability Emerging Under the Guise of Promissory Estoppel: An Explanation and Defense*, 33 WAYNE L. REV. 895, 895 (1987) (concluding that courts rely on promissory estoppel "when a plausible benefit to the promisor can be identified" that can support an inference of assent to the bargain); Yorio & Thel, *supra* note 404, at 111 (concluding that "judges actually enforce promises rather than protect reliance in Section 90 cases"). Only one study has concluded differently. *See* Michael B. Metzger & Michael J. Phillips, *The Emergence of Promissory Estoppel as an Independent Theory of Recovery*, 35 RUTGERS L. REV. 472, 509-11 (1983)

to protect either the parties' bargain[406] or various species of promises unrelated to reliance: promises "made in furtherance of an economic activity";[407] promises where "a plausible benefit to the promisor can be identified" that can then support an inference that the promisor indeed had assented to a bargain;[408] or the same types of promises that the bargain approach to contracts generally enforces but that otherwise would not have been enforced under existing contract doctrine.[409] Notably, *all* of these scholars' descriptions of post-U.C.C. promissory estoppel appear much more like a variant of the Agreement theory than the independent alternative to Agreement that promissory estoppel previously had been. Further evidence of the erosion of promissory estoppel's Reliance core is that courts usually have not awarded reliance damages under section 90 but instead have given full expectation damages or have granted specific performance.[410] In short, section 90's Reliance core has been dislodged.

There are two reasons why the displacement of Reliance from section 90 intimates that Reliance's displacer has great weight. First, unlike common law concepts and similar to a statute, section 90 has a fixed text that, one would expect, would have resisted the radical doctrinal remolding of the sort that has taken place. Second, since the bulk of the section 90 cases has not involved sales of goods and hence has fallen outside of Article 2's purview,[411] the Agreement approach contained in Article 2 was not, as a legal matter, the presumptive doctrinal framework. Still, Agreement trumped—indeed, absorbed—Reliance.

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(concluding that promissory estoppel has been invoked to compensate a promisee who has reasonably relied on a promise).

406. *See* Henderson, *supra* note 405, at 346-47.

407. Farber & Matheson, *supra* note 405, at 905.

408. Kostritsky, *supra* note 405, at 905-06.

409. *See* Yorio & Thel, *supra* note 404, at 111, 114-15 (concluding that "judges actually enforce promises rather than protect reliance in § 90 cases").

410. *See id.* at 129-39.

411. *See, e.g.*, Gibson, *supra* note 385, at 674. There are reasons to believe that the dominance of the Agreement theory outside of sales of goods is attributable to Article 2. First, Article 2 is highly respected among both practitioners and scholars. Second, analysis of modern contracts casebooks and informal polling of law students across the country revealed that most law students' study of *general* contract law most often is accomplished via the study of Article 2 of the U.C.C. This teaching method undermines Article 2's *sui generis* character and implicitly portrays Article 2's contract doctrine as transubstantive. Perhaps these two factors explain the fact that Article 2's spirit has spread beyond the "sales of goods"—a reality evidenced by the fact that Section 90's reliance foundation has been undermined even in non-Article 2 cases. These, then, are some of the consequences of Article 2's having come to play the significant heurestic role envisioned by Holmes and the adherents of the Meta-Scheme school.

(2) The Fate of Substantive Fairness

Substantive Fairness approaches to contract have also been marginalized in practice since the U.C.C.'s adoption, though the precise dynamics at work are more complex than those involving Reliance. The complexity arises for two reasons: (1) there are several applicable legal provisions designed to advance Substantive Fairness which must be taken into account, and (2) the Code does in fact advance the prominence of at least one major incarnate of Substantive Fairness, namely, unconscionability. When all is said and done, however, the provisions incorporating a Substantive Fairness approach to obligation formation are only seldomly invoked in merchant-merchant contexts. Further, and significantly, these doctrines have been relegated to play the role of mere equitable safety nets, with the result that the various Substantive Fairness doctrines have remained "unrulified," which is to say that courts have not been able to concretize the abstract standard into a rule.[412] This has two significant consequences. First, it means that Substantive Fairness has not been put into a form in which it can affirmatively identify persons' obligations, thereby limiting Substantive Fairness' practical educative power. Second, the unrulified nature of the various Substantive Fairness approaches makes Substantive Fairness appear unworkable in business contexts. This has the effect of further entrenching the intellectual dominance of the Agreement approach to obligation formation.

(a) U.C.C. Section 2-302

Study of the state of post-Code Substantive Fairness must begin by examining the jurisprudence of U.C.C. section 2-302, the unconscionability provision, which is the most direct descendent of Substantive Fairness found in the Code. As an initial matter, it must be acknowledged that by including section 2-302, the Uniform Commercial Code played a vital role in making unconscionability a legitimate ground for voiding an otherwise valid contract;[413] whatever role Substantive Fairness played prior to the mid-nineteenth century,[414] it is undisputed that the Agreement approach prevailed in the early twentieth century.[415]

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412. *See supra* note 95 and accompanying text.

413. *See, e.g.*, Williams v. Walker-Thomas Furniture, Co., 350 F.2d 445 (D.C. Cir. 1965) (explicitly relying on U.C.C. § 2-302 to strike down installment contract); *see* U.C.C. § 2-302 official comments (noting that courts are empowered to void contracts on the basis of U.C.C. § 2-302 rather than through formalistic machinations); Jane P. Mallor, *Unconscionability in Contracts Between Merchants*, 40 SW. L.J. 1065 (1986).

414. *See supra* note 373.

415. *See* HORWITZ, *supra* note 58, at 160-61.

But this only starts the story: although the Code created/resurrected the Substantive Fairness doctrine, it did so in a manner that relegated it to a permanently marginalized role.[416] In keeping with the Code, courts pass to unconscionability analysis only *after* undertaking "traditional" Agreement theory analysis; initial determination as to whether there is a contractual obligation does not involve assaying the fairness of the exchange. Rather, consistent with the Code's language, courts have not acted to ensure substantively fair exchanges, but have only intervened to prevent egregiously unfair results;[417] section 2-302 does not guarantee "conscionable" or fair contracts, but is designed to block only *un*conscionable terms and contracts. Because unconscionability is used only as an equitable safety net, courts have not been given the opportunity to generate a rulified unconscionability doctrine.[418] This inability to concretely formulate businesspersons' duties is evidence that unconscionability has both been marginalized and been a cause of further marginalization, since it has undercut the extent to which businesspersons' loadstar intuitions have been shaped by the Substantive Fairness approach. Additional evidence of Substantive Fairness' marginalization is the infrequency with which unconscionability has been successfully invoked in contracts between merchants.[419]

Furthermore, paralleling promissory estoppel, unconscionability's core of Substantive Fairness has been displaced by an Agreement approach to obligation formation. Commentators are in consensus that few, if any, cases have applied the U.C.C.'s unconscionability provision to void bargains struck between parties that are in fact substantively unfair.[420] Rather, unconscionability generally is applied only where

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416. *See supra* part IV.C.1.a.

417. *See* Mallor, *supra* note 413, at 1066, 1067 nn.13-14 (noting that court "[o]pinions quite commonly assert a virtual presumption against unconscionability in contracts between merchants or rebuff a merchant's claim of unconscionability with the most perfunctory of explanations," and colleeting cases).

418. Symptomatic of this is that the bulk of unconscionability scholars' attention has been directed to developing a doctrinal framework for unconscionability. *See, e.g.*, Arthur A. Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485 (1967); Mallor, *supra* note 413, at 1084 n.147 (proffering a "proposed framework for evaluating unconscionability claims in contracts between merchants"); Asifa Quaraishi, Comment, *From A Gasp to a Gamble: A Proposed Test for Unconscionability*, 25 U.C. DAVIS L. REV. 187 (1991). For an argument that unconscionability is susceptible to being rulified, see *infra* part IV.C.1.d.(1).

419. *See* John E. Murray, *The Standardized Agreement Phenomena in the Restatement (Second) of Contracts*, 67 CORNELL L. REV. 735, 779 (1982).

420. *See* Jeffry L. Harrison, *Class, Personality, Contract and Unconscionability*, 35 WM. & MARY L. REV. 445, 501 (1994); Craig Horowitz, Comment, *Reviving the Law of Substantive Unconscionability: Applying the Implied Covenant of Good Faith and Fair Dealing to Excessively Priced Consumer Credit Contracts*, 33 UCLA L. REV. 940, 942

there also has been "procedural" unconscionability, that is to say, where circumstances show that fair bargaining did not take place.[421] In other words, unconscionability intervenes where circumstances have prevented a legitimate "Agreement" from being made. Unfairness of the exchange—what had been the Substantive Fairness core of unconscionability—has been denominated "substantive unconscionability" and, according to most, does not alone suffice to void a contract. This is a mark of Substantive Fairness' near-complete assimilation into Agreement.

(b) Little FTC Acts

Section 5 of the Federal Trade Commission Act provides a private right of action against businesses that conduct "unfair methods of competition" or engage in "unfair or deceptive acts or practices."[422] Over the past years all fifty states have adopted versions of the FTC Act, frequently referred to as "little FTC Acts." This proliferation of little FTC Acts might at first glance appear inconsistent with this Article's claim that the Agreement approach incorporated in Article 2 of the U.C.C. has eclipsed alternative approaches such as Substantive Fairness and Reliance. And, it might be claimed, judicial implementation of the little FTC Acts confirms the strength of post-Code Substantive Fairness and Reliance. After all, at least one court has employed a little FTC Act to find a business liable for breach of a noncontractual promise beyond what would have been protected by promissory estoppel.[423] And many courts have used little FTC Acts to police substantively unfair bargains by employing an FTC-authorized unconscionability doctrine which was broader than that under the U.C.C.'s doctrine of unconscionability.[424]

In fact, the advance of little FTC Act jurisprudence only confirms the power of Article 2's Agreement orientation. First, as is the case with unconscionability under the U.C.C.,[425] the little FTC Acts operate as

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n.14 (1986) (reporting that from 1971-1986 "no court has declared a contract unconscionable solely on substantive unconscionability grounds"). *But see* Melvin A. Eisenberg, *The Bargain Principle and its Limits*, 95 HARV. L. REV. 741, 752 (1982) (identifying ten cases where findings of unconscionability were based solely on price).

421. *See* Harrison, *supra* note 420; Mallor, *supra* note 413, at 78-80 & nn.111-14 (noting that only a "few cases exist which courts have found contracts between two commercial parties to be unconscionable without any discussion of the existence of procedural unconscionability"); *cf.* Leff, *supra* note 418 (arguing that unconscionability should be found only where there has been a showing of procedural unconscionability).

422. 15 U.S.C. § 45(a)(1) (1988).

423. *See* Shell, *supra* note 376, at 1227-28 & n.161 (bringing one case).

424. *See id.* at 1228-30 nn. 165-66 (collecting cases).

425. *See supra* note 240 and accompanying text.

a back-up safety net rather than a determinant of the primary rules of conduct. The Acts penalize "unfair" and "deceptive" conduct, but they do not identify the affirmative duties owed by one businessperson to another to instruct businesspersons how to behave. Indeed, the Acts generally protect only against egregious abuses as measured by the norms of contemporary business practice, not in relation to an aspiration of greater trust.[426] As a result, the little FTC Acts do not challenge the paradigm of interpersonal obligations created by the Agreement theory. This is reflected by the fact that "many state FTC Act decisions appear simply to duplicate common law developments occurring in other states" and do not exhibit a spirit independent of the common law.[427]

The style of legal and business education in America accentuates marginalization of any message of Substantive Fairness contained in the little FTC Acts. The bulk of time that lawyers and businesspersons spend learning about the nature of legal obligations occurs in the context of studying contractual obligation, a doctrinal field dominated in every way by the Agreement theory. The little FTC Acts, along with the U.C.C.'s doctrines of unconscionability and good faith, doctrinally function as, and are viewed as, analgesics to cure the sting of rough business play rather than as independent rules of behavior.

The greatest measure of the intellectual hegemony of Article 2's Agreement theory is that the FTC Act was a *legislative* initiative that did not originate with the judiciary. This is prima facie surprising, for the Substantive Fairness and Reliance elements that are incorporated in the little FTC Acts were found in pre-Code caselaw.[428] But whereas in the common law past, reorientation of a field's doctrinal spirit was capable of being undertaken in the courts,[429] the codified (and thereby fixed) Agreement orientation could only be challenged at the legislative level.

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426. For example, in Massachusetts, one of the jurisdictions with the broadest adaptations of the FTC, Shell, *supra* note 364, at 1214-15, liability under the Act is triggered only by business behavior that reaches "a level of rascality that would raise an eyebrow of someone inured to the rough and tumble of the world of commerce." Levings v. Forbes & Wallace, Inc., 396 N.E.2d 149, 153 (Mass. App. Ct. 1979); *see also* Tagliente v. Himmer, 949 F.2d 1, 7 (1st Cir. 1991) (reiterating the "rascality standard" necessary to trigger liability under Massachusetts' little FTC Act).

427. Shell, *supra* note 364, at 1235-36; *see, e.g.*, Quaker State Oil Refining Corp. v. Garrity Oil Co., 884 F.2d 1510, 1513 (1st Cir. 1989) (concluding that to bring a claim under Massachusetts' little FTC Act a party must establish "that the defendant's actions fell 'within at least the penumbra of some common-law, statutory, or other established concept of unfairness,' or were 'immoral, unethical, oppressive, or unscrupulous,' and resulted in 'substantial injury' . . . to competitors or other businessmen.") (quoting 29 Fed. Reg. 8325, 8355 (1964)).

428. *See supra* notes 373-74.

429. *See generally* HORTWITZ, *supra* note 58.

This shift from courts to legislatures has had a pernicious effect on the development of rules capable of effectively implementing the little FTC Acts' policies. As with the unconscionability doctrine, the courts did not function as laboratories that, through accretion of experience, were capable of constructing doctrinal apparatuses to implement the Substantive Fairness spirit. When seeking to implement alternatives to the Agreement theory, therefore, legislatures could only author abstract standards—prohibiting "unfair" conduct, and the like. And because the little FTC Acts have been used as safety nets invoked only when unqualified application of the Agreement approach would yield particularly unpalatable results, courts have been prevented from rulifying the little FTC Act's standards post-legislation. In short, the jurisprudential history of the little FTC Acts—which demonstrates that the Substantive Fairness approach implicit in the Acts has been kept in a doctrinally undeveloped state—confirms rather than disproves the post-Code predominance of the Agreement approach to obligation creation.

*d. The Code's Culpability in Crowding Out Reliance and Substantive Fairness*

Having shown that Substantive Fairness and Reliance approaches to obligation creation have been severely marginalized, it remains to be demonstrated that this occurred because of the enactment of Article 2 of the Uniform Commercial Code, and not for other reasons (such as the alternatives' unworkability in the business world). This section will show the causal link between the Code's elevation of Agreement and the alternatives' decline. I will argue here (1) that there is no reason to believe that either a Substantive Fairness or Reliance approach would be unworkable in the business world, (2) that there is reason to believe that, other things being equal, these doctrines would have expanded over the last forty years, and (3) that the alternatives' marginalization in practice is most likely a byproduct of the Agreement theory's contemporary dominance, which is attributable to Article 2 of the U.C.C.

(1) Practicability of the Alternatives to the Agreement Paradigm

Some scholars have suggested that Reliance and Substantive Fairness are inherently vague doctrines unsuitable to the business world, which requires crisp and clear rules so that businesspersons know precisely the nature of their obligations.[430] This view is incorrect for three reasons.

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430. *See* RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 25-26 (4th ed. 1992); Gibson, *supra* note 385, at 662-63; Alan Schwartz, *Relational Contracts in the Courts:*

First, it exaggerates the extent to which the dominant Agreement approach itself has been rulified in the Uniform Commercial Code. As seen earlier, the U.C.C. employs a particularly broad standard to determine the important question of when a contractual obligation has been created: "A contract for sales of goods may be made in any manner sufficient to show agreement."[431] This has not proved to be problematic in practice because courts have observed recurring factual scenarios and have rulified the standard.

The second reason such criticisms are mistaken is that there is no *a priori* reason why broad standards like Substantive Fairness and Reliance could not have been rulified over time by courts. Similarly broad language has been operationalized by courts into crisp rules in the field of antitrust, an important body of law integrally linked to business. The Sherman Act's prohibition against "[e]very contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce"[432] is a notoriously abstract standard that makes not even an oblique reference to the horizontal and vertical market restrictions and other tests grafted onto the statute by the courts to rulify the standard. Tellingly, due to courts' rulifying activities, "vagueness" is not among the criticisms levelled at the antitrust laws by scholars critical of antitrust. It is fair to say that, over time, courts and commentators[433] together have carried the legislation's embryonic standard into a mature rulified doctrinal apparatus. Similarly, a relatively rulified jurisprudence has operationalized the requirement found in the National Labor Relations Act—another important piece of legislation affecting the business community—that parties engaged in collective bargaining negotiate "in good faith."[434] Further, there are several rule-based doctrinal apparatuses found in the pre-Code caselaw[435] and that have been developed by scholars[436] to implement Substantive Fairness and Reliance

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*An Analysis of Incomplete Agreements and Judicial Strategies*, 21 J. LEGAL STUD. 271, 277 (1992) (arguing that "[t]he set of publicly supplied, transcendently fair terms and the set of publicly supplied, efficient terms probably are disjointed"); Shell, *supra* note 376, 1241-48 (summarizing law and economic literature regarding the need for certainty in contracts and the undesirability of using rules incorporating ethical precepts like fairness).

431. U.C.C. § 2-204(a).

432. 15 U.S.C.A. § 1 (West Supp. 1994).

433. *See, e.g.*, PHILLIP AREEDA & DONALD F. TURNER, ANTITRUST LAW (1978).

434. 29 U.S.C.A. §§ 151-169 (West Supp. 1994); *see* Farnsworth, *supra* note 364, at 273 (observing that "most claims that a party has engaged in unfair dealing to obstruct agreement [under the N.L.R.A.] can be grouped under seven headings").

435. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 90 (promissory estoppel).

436. Melvin Eisenberg, *The Responsive Model of Contract Law*, 36 STAN. L. REV. 1107 (1984) (providing a rulified contract doctrine based on Substantive Fairness);

spirits. The presence of rulified standards in other legal fields and the rulified doctrines in pre-Code caselaw and scholarly works collectively point to the conclusion that there can be rulified alternatives to the Agreement theory.

So why hasn't Substantive Fairness or Reliance been rulified? The dominance of the Agreement approach under the Uniform Commercial Code has halted doctrinal operationalization of these alternatives. Because unconscionability and promissory estoppel are only available as back-up equitable relief, courts have not been afforded the opportunity to rulify these alternative approaches. Only a fraction of the litigated contract cases are analyzed in terms of the Code's Substantive Fairness or Reliance incarnates, and when such doctrines are invoked, judges are content merely to apply them as anodynes, without regard for clarifying their precise scopes. Those scholars who have concluded that these alternatives to the Agreement paradigm are inherently unsuitable to being rulified on the basis that rulified Substantive Fairness and Reliance doctrines have not emerged thus have confused effect for cause. Assuming these scholars are correct that contract law must utilize crisp knowable rules that efficiently put market players on notice concerning required conduct, such critiques are not appropriately levelled at Substantive Fairness or Reliance approaches to obligation creation, but rather at the conditions that have prevented such alternative approaches to contract from becoming rulified. And the culprit that has prevented development of rules incorporating alternative spirits is the Agreement theory's monopolization of courts—under which Substantive Fairness and Reliance only are appealed to as equitable safety nets—which in turn is attributable to Article 2 of the Uniform Commercial Code. Ironically, then, by impeding doctrinal development of the alternatives to Agreement, marginalization has further entrenched the intellectual dominance of the Agreement theory.

The third reason underlying the untenability of the assertion that Substantive Fairness and Reliance are unworkable is that even if these alternative paradigms are not as susceptible to crisp rulification as the Agreement theory, it does not follow that the Agreement theory must prevail. Greater efficiencies afforded by clear rules are only one value among many that must be balanced in choosing a legal regime. American business law does not always elect the most economically efficient legal regime. For example, under Title VII of the federal employment laws, the greater societal interests in protecting disabled, elderly, and religious

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Farnsworth, *supra* note 364, at 221-49, 269-85 (offering a framework for imputing contract-based liability premised on fairness and reliance, and offering a seven-part rulified doctrine of "fair dealing"); Ian Macneil, *Relational Contract: What We Know and Do Not Know*, 1985 WIS. L. REV. 483 (suggesting a model of contract based on reliance).

workers outweigh the businessperson's strict "bottom line" calculus. Businesses are not permitted to hire and retain only the most cost-efficient workers, but are forced by law to absorb the added costs associated with continuing to employ elderly workers[437] and with reasonably accommodating workers who are disabled[438] or religious.[439] Similarly, the question must be asked whether protecting persons' interests in being treated fairly, honestly, and respectfully, and society's interests in generating reserves of good will and trust,[440] justify imposing the financial costs that may attend a contract regime better suited than the Agreement approach to achieving these noneconomic goals.[441]

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437. *See* ABIGAIL COOLEY MODJESKA, EMPLOYMENT DISCRIMINATION LAW § 3:19, at 35 (3d ed. 1993) (noting that most lower courts have held that the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634, prohibits businesses from making employment decisions vis-à-vis protected workers based on salary considerations, pension eligibility, insurance costs, and other such economic factors correlated with age); *see, e.g.*, Jardien v. Winston Network, Inc., 888 F.2d 1151 (7th Cir. 1989) (holding the replacement of older employees with younger workers to save salary costs to be unlawful under ADEA); Tullis v. Lear School, Inc., 874 F.2d 1489 (11th Cir. 1989) (refusing to hire older applicant due to higher insurance costs constituted age discrimination). *But see* Hazen Paper Co. v. Biggins, 113 S. Ct. 1701 (1993) (suggesting that only employment decisions based on "[t]he prohibited stereotype ('Older employees are likely to be . . . .')" may be violative of the ADEA).

438. *See* 42 U.S.C. § 12112(b)(5)(A) (providing that failure to make reasonable accommodation to the known physical or mental limitations of an otherwise qualified applicant or employee constitutes unlawful discrimination unless employer can demonstrate that accommodation would impose an undue hardship on the business).

439. 42 U.S.C. § 2000e(j) (providing that the protection provided by Title VII to religion "includes all aspects of religious observance and practice . . . unless an employer demonstrates that he is unable to reasonably accommodate an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business"); *see, e.g.*, Draper v. United States Pipe & Foundry Co., 527 F.2d 515, 522 (6th Cir. 1976).

440. *See* Shell, *supra* note 376, at 225-26 & nn. 13-20 (noting that "[s]ocial psychologists, sociologists, economists, philosophers, and legal scholars all have recognized that trust is central to the efficient coordination of human goals") (citations omitted).

441. This is not to imply that the law alone can make people act saintly and that there is no need for extra-legal ethics. *See generally* Thomas W. Dunfee, *The Case for Professional Norms of Business Ethics*, 25 AM. BUS. L.J. 385, 390 (1987) ("Ethics goes beyond law, and should not be treated as an alternative legal system."). But the example of the federal employment laws highlights that it is not obvious what behaviors should be made obligatory in the law and which should remain in the realm of legally unenforceable ethics; in the past, for example, many people viewed norms of nondiscrimination and accommodation as belonging to the domain of ethics. Further, it is axiomatic that different legal regimes are more or less conducive to the health of extra-legal ethics. The Agreement theory is uncertain soil, at best, for ethics' survival and augmentation.

(2) Evidence That, Absent the Dominance of the Agreement Theory, the Alternatives Would Have Been Relied upon More Heavily

It could be claimed that, even if the alternatives to the Agreement theory of obligation creation *could* have been rulified, the Agreement theory prevailed not due to the U.C.C.'s having adopted the Agreement theory but because that approach better comports with the dominant ethic of America as a whole, and the business community in particular. There are two responses. The first is that, even if the Agreement theory does best mirror current business ethics, it does not follow that the Agreement theory should be allowed to be dominant. Law appropriately contains an aspirational component. Whether contract law *should* merely reflect the present ethic or work to shape a new sensibility is a complex question that involves recourse to the type of philosophical/theological issues discussed earlier.[442] By marginalizing the alternatives to the Agreement theory and by blocking their doctrinal development, the U.C.C. has made the Agreement theory appear to be the only practicable approach to contract. The Agreement theory's apparent axiomatic character has masked the larger philosophical discussion that must inform the decision as to what ethic should be advanced. In this important way, the Code has blocked the potential development of the alternatives.

Second, there is strong evidence that the Agreement theory *has been* viewed as problematic and that the alternatives have not been cultivated because of the Agreement theory's dominance. The rest of this sub-part will show that academics, legislatures, and the business community itself have recognized problems associated with the dominance of the Agreement theory and have proffered piecemeal solutions to the problems. Their proffered solutions have been only partly successful because these parties have been inattentive to a major source of the problem—the dominance of the Agreement theory. Moreover, adopting (or, at least, further developing) either or both of the alternatives to the Agreement theory would have better addressed the diagnosed problems. Taken together, these factors—acknowledged problems stemming from dominance of the Agreement theory, superficial piecemeal remedies, and failure to address the root of the problem by expanding use of the alternatives to the Agreement theory—support the inference that the alternatives to the Agreement theory were not consulted because they were crowded out by Agreement's dominance, which, in turn, is attributable to Article 2 of the U.C.C.

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442. *See supra* part IV.C.1.a.

Three apparently disparate phenomena have emerged recently from three sectors of society: the movement among academics to identify legal bases for deterring negotiation misbehavior;[443] every state legislatures' passage of little FTC Acts;[444] and the adoption of codes of professional ethics by a majority of this country's trade associations.[445] These three phenomena are linked. Academics, legislatures, and the business community all are responding to the identical problem—a general lack of trust and good faith within the business community.

Significantly, all these problems are attributable to no small extent to the dominance of the Agreement theory. Looking first to the problem of negotiation misbehavior, the only obligations beyond tort and public law incumbent upon a person under the Agreement theory are those voluntarily taken upon herself. This intellectual and legal regime provides the foundation for the law relating to good faith, under which the duty to act in good faith is triggered only *after* the parties have reached agreement on a contract.[446] Before agreement, i.e., during negotiations, parties are free to distort and prevaricate. The problem of negotiation misbehavior is thus a direct outgrowth of the Agreement theory, for negotiation takes place pre-agreement, which is prior to the point when special duties between the parties come into existence. Similarly, the more general problems of deception and bad faith, which legislatures have sought to ameliorate through little FTC Acts and which businesses have addressed through their codes of ethics, also are outgrowths of the Agreement theory. As an outgrowth of an ethic of atomism, under which people are trained to think in terms of themselves rather than the community, the Agreement approach implicitly instructs that people are presumptively autonomous and that they have limited interpersonal duties to others. It is this intellectual and legal environment that provides fertile ground for opportunistic conduct and other behaviors antithetical to trust-building. The little FTC Acts and the codes of business ethics are formulated to address these problems in the business environment.

The efficacy of the solutions proffered by academics, legislatures, and the business community has been hampered by the dominance of the Agreement theory. Turning first to the problem of negotiation misbehavior, Professor Farnsworth has argued that "existing contract

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443. *See* Farnsworth, *supra* note 376; G. Richard Shell, *Opportunism and Trust in the Negotiation of Commercial Contracts: Toward a New Cause of Action*, 44 VAND. L. REV. 221, 433 (1991).

444. *See supra* part IV.C.1.c.(2).(b).

445. *See Association of Business Executives* (n.d.) (pamphlet on file with author) (noting that 58% of all American trade associations have adopted professional codes of ethics, and 63% have enforcement mechanisms).

446. *See supra* note 376.

doctrines" of unjust enrichment, misrepresentation, promissory estoppel, and good faith offer an adequate solution to the problems of undesirable behavior during precontractual negotiations.[447] Professor Farnsworth acknowledges, however, that few courts have in fact resorted to these doctrines to protect parties who have been wronged during negotiations,[448] which he suggests shows either that negotiation misbehavior does not occur with great frequency[449] or that lawyers are ignorant of these remedies.[450] Empirical evidence casts doubt on the first explanation.[451] Lawyers' and courts' lack of awareness of these doctrines is the more likely culprit, but the question must be asked: why have courts and lawyers permitted these remedies to pass them by? A compelling answer is that *any* doctrine of pre-contractual extra-tort obligation is a conceptual oxymoron in American jurisprudence. After all, under American law, tort defines "general" obligations existing between people, and contract by agreement is the mechanism by which people augment their personal obligations vis-à-vis select other parties. Utilizing the four doctrines he suggests to create agreement obligations beyond those imposed by tort law thus would require lawyers to undertake a veritable paradigmatic shift. It is no surprise this rarely occurs. Of course, if contractual obligation were deemed to result due to reasonable reliance or substantive fairness, employment of the doctrines to which this scholar points would be second nature. Thus, the

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447. *See* Farnsworth, *supra* note 376, at 220.

448. *See id.* at 233 (noting that "[d]espite the appeal of restitution, it has been largely neglected as a basis of precontractual liability"); *id.* at 235 ("But courts have rarely applied the law of misrepresentation to failed negotiations"); *id.* at 237-38 (noting the "small number of cases in which claimants have sought recovery based on promises made during preliminary negotiations" and that the case of Hoffman v. Red Owl Stores, Inc., 26 Wis. 2d 683, 133 N.W.2d 267 (Wis. 1965) "has not lived up to its promise"); *id.* at 239 (noting that "American courts . . . have been unreceptive to [arguments of a general obligation of fair dealing] and have declined to find a general obligation that would preclude a party from breaking off negotiations, even when success was in prospect").

449. *See id.* at 235 (noting there have been few misrepresentation cases because "parties are rarely tempted to misrepresent their intent"); *id.* at 242 (noting approvingly that only "few claims . . . arise" under restitution, misrepresentation, and specific promise").

450. *See id.* at 233 (suggesting the small number of cases granting restitution may be due to the fact that potential litigants "have silently acquiesced in the common law's aleatory view of the negotiation process"); *id.* at 237-38 (explaining the small number of promissory cases as due to "an unawareness by lawyers of the possibility" of successfully collecting under such theory); *id.* at 242 (noting there has been little reliance on good faith to recover because "the disappointed parties to negotiations are unaware of the possibility of a generous measure of precontractual liability").

451. *See, e.g.*, Shell, *supra* note 443.

infrequency with which lawyers rely on those doctrines is yet additional evidence of the degree to which the Agreement theory has dominated the legal community's contract consciousness—an outcome attributable to Article 2.

Moreover, scrutiny of the doctrines on which the aforementioned scholar relies bespeaks not only the dominance of the Agreement theory but also the contemporary suitability of the alternatives to the Agreement theory. The four doctrines he invokes—misrepresentation, promissory estoppel, restitution, and good faith—are decidedly *not* part of mainstream contract theory. Misrepresentation is derivative of torts. Good faith and restitution, which are close cousins of Substantive Fairness, and promissory estoppel, which incorporates a Reliance approach to obligation creation, are the vestiges of alternatives to the Agreement theory.[452]

So what in fact is happening? Contemporary contract doctrine, which is concerned to a great extent with determining *when* the parties have come to an agreement generating contractual obligations, is largely out of step with the large modern business deal, where lengthy pre-agreement negotiations are followed by readily identified "closings" at which the parties' agreement is sealed.[453] The nature of today's business practice—where negotiations are drawn out and are instrumental to more than just the deal[454]—requires that parties be put into a position of having absorbed obligations even *before* they have agreed to take on duties. This is fundamentally at odds, however, with the Agreement theory animating contract law under U.C.C. Article 2. Therefore, the doctrines to which Professor Farnsworth, who has labored to solve the problems of negotiation misbehavior, has turned for solace are those marginalized alternatives to obligation creation—Substantive Fairness and

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452. It is interesting to observe how Professor Farnsworth's work exemplifies the degree to which Agreement remains the dominant paradigm. Farnsworth claims that his article shows how traditional contract doctrines, "imaginatively applied, are both all that are needed and all that are desirable" in today's business world. Farnsworth, *supra* note 376, at 220. In fact, the remedies upon which he relies are not based on traditional Agreement theory doctrine, but belong to the marginalized alternatives to Agreement.

453. In Farnsworth's words, "the law governing the formation of contracts," which is to say the rules of offer, acceptance, rejection, counter-offer, revocation and lapse, "however suited these rules may have been to the measured cadence of contracting in the nineteenth century . . . have little to say about the complex processes that lead to major deals today." *Id.* at 218-19. This is so because negotiations are undertaken by intermediaries (such as lawyers and accountants) who clearly do not have the power to bind the corporation. Consequently it is patently clear when "acceptance" has occurred: when the "[m]ajor contractual commitments . . . set out in a lengthy document, or in a set of documents[, are] signed by the parties in multiple copies and exchanged more or less simultaneously at a closing." *Id.* at 218.

454. *See* Shell, *supra* note 443, at 232-33 (noting that negotiations not only are important to arrive at agreed upon terms but also serve to forge business relationships).

Reliance: he advocates a legal regime that turns the Agreement theory on its head, where extra-tort duties are imposed on parties even *before* they have exercised their autonomous wills and agreed to be so obligated. More generally, the doctrinal attempts undertaken by Professor Farnsworth and others[455] to guide negotiation behavior is an indication that today's business world requires a level of accountability beyond merely what one party has agreed to take on itself. But because the dominant Agreement paradigm has not been forthrightly challenged, lawyers and courts have been unable to undertake the paradigm shift implicit in heeding Professor Farnsworth's call.

The degree to which the little FTC Acts have been able to create a more trusting business environment also has been hampered by the dominance of the Agreement theory. Like the U.C.C.'s unconscionability provision, the little FTC Acts have been invoked only as equitable safety nets, blocking their doctrinal development. As a result, the broad standard-like language used by the legislatures has not been rulified, limiting the extent to which the Acts have been capable of providing detailed behavioristic lessons to businesses. Finally, because the FTC Acts tend to penalize only those behaviors that deviate from accepted business practice, the FTC Acts have not functioned to *improve* the business climate, but only to ensure that parties play according to the same rules. Significantly, the little FTC Acts have not challenged the rules—which derive from the atomistic Agreement theory—themselves. The little FTC Acts probably have served to brake further degeneration of the business environment. But they do not appear to have succeeded in cultivating an environment of greater trust and good will.

It is into this vacuum of trust and good will that the proliferation of Business Trade Associations' codes of ethics have migrated. These codes of ethics typically govern members' behaviors vis-à-vis other members.[456] The spread of these ethics codes, which deal with basic issues such as trust and honesty,[457] signifies that the law is inadequate. While I do not intend here to evaluate the ethics codes' efficacy, two observations are in order. First, leaving trust-building to industry-by-industry ethics codes is an inefficient and incomplete means of

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455. *See, e.g.*, Shell, *supra* note 443.

456. *See, e.g.*, NATIONAL ASS'N OF REALTORS, CODE OF ETHICS AND STANDARDS OF PRACTICE art. 6 (1994) ("Realtors shall seek no unfair advantage over other Realtors and shall conduct their business so as to avoid controversies with other Realtors."); *id.* art. 7 ("Realtors [have] an obligation to treat all parties honestly."); *id.* art. 22 ("Realtors shall cooperate with other brokers except when cooperation is not in the client's best interest."); *id.* art. 23 ("Realtors shall not knowingly or recklessly make false or misleading statements about competitors, their business, or their business practices.").

457. *See id.*

accomplishing the task. It is inefficient because each industry must invest resources to draft a code and run an enforcement mechanism. It is incomplete because relationships *between* industries will remain ungoverned and problematic.

Second, the spread of these codes of ethics indicates that the business community itself recognizes the need for greater trust and good will. This undercuts the claim that dominance of the Agreement theory comports with the gestalt of the business community. Indeed, the spread of these codes of ethics, along with academic responses to negotiation misbehavior and the rise of little FTC Acts, all of which incorporate ethics more consistent with the alternatives to Agreement than with Agreement itself, collectively suggest the likelihood that the alternatives to Agreement would have been resorted to with increasing frequency over the last forty years, all other things being equal. That the alternatives have not been more frequently invoked and further developed bespeaks the dominance of the Agreement theory of obligation creation. The dominance of that approach is in turn attributable to Article 2 of the Uniform Commercial Code.

### 2. FEDERAL RULES OF EVIDENCE

The Federal Rules of Evidence are also animated by a nonaxiomatic spirit that has received little attention from scholars. Although more difficult to document than in the case of Article 2 of the U.C.C., there are signs that the evidence Code's spirit also has pushed post-Code development in a particular direction. There also are unmistakable indications that the chosen sprit socializes citizens in a specific manner.

The Federal Rules of Evidence do not acknowledge their integral connection to the litigation system at large. This has helped conceal the fact that by helping to operationalize the litigation system, current evidentiary rules are a handmaiden to the adversarial system. As such, evidence law partakes in the fundamentally adversarial spirit characteristic of modern American procedure. After locating alternative approaches to procedure and identifying the behaviors each encourages, I will show that the Federal Rules of Evidence adopt the spirit of adversarialism. I will then show the consequences of the Code's having adopted its approach in a manner that hides both evidence's initimate connection to the litigation system and the particular spirit of the procedural system.

The American model is an adversarial model, which is only one among many different systems of dispute resolution; settlement,

negotiation, conciliation and mediation are some alternatives.[458] Although such dispute mechanisms as settlement, mediation, and court-annexed arbitration are not foreign to the American litigation system—indeed, far more cases settle than continue to full trial—it cannot be disputed that our procedural system places settlement, negotiation, and mediation on the intellectual margins of dispute resolution.

Significantly, the adversarial system, akin to the Agreement theory of obligation creation that undergirds Article 2 of the Uniform Commercial Code, advances an ethic of atomism rather than interconnection. In what way? First, it is likely that the current litigation system abets distrust among people, as the adversarial system itself "operates on a theory of fundamental distrust: never put faith in the adversary."[459] Second, the current system trains its citizens to envision the war of trial[460] rather than attempt cooperative efforts to find common ground when confronted with conflicts that must be resolved. One could imagine a litigation system that placed settlement closer to its core.[461] Although we can only conjecture, it is not inconceivable that a dispute resolution system that viewed the combat of trial as the undesirable last resort would have the spillover effects of encouraging a more peaceful, less confrontational social life.[462] At the very least, an alternative dispute resolution system might seek to reshape conflicts into possibilities for constructive problem-solving and relationship-building.[463] Instead, by inviting belligerence[464]—the paradigm of

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458. *See generally* Jethro K. Lieberman & James F. Henry, *Lessons from the Alternative Dispute Resolution Movement*, 53 U. CHI. L. REV. 424 (1984).

459. *Id.* at 427.

460. *Cf.* Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 506 (1986) (quoting a member of the Federal Rules of Civil Procedure's Advisory Committee who wrote that "[j]ustice can best be reached in each litigated case if to some extent the case is in the nature of a warfare between the plaintiff and defendant").

461. Under Jewish law, for example, the legal rules reflect a norm that favors negotiated settlements over full-blown litigations. *See, e.g.*, BABYLONIAN TALMUD SANHEDRIN 6b (Soncino Press 1935) (6th Century C.E.); JOSEPH CARO, SHULCHAN ARUCH, CHOSEN MISHPAT 12:2 (Hidur Press 1980) (15th century C.E.); MOSES MAIMONIDES, MISHNA TORAH SANHEDRIN 22:4 (HaMisura Press 1982) (13th century C.E.).

462. *Cf.* Lieberman & Henry, *supra* note 458, at 427-29 (noting that "the creation of trust is central to the design of many ADR processes" and that "processes designed to restore and build trust can overcome the suspicion and mutual hostility fostered by the adversary system and can lead the parties to settle their differences").

463. *Cf.* Albie M. Davis, *Teaching Ideas: Dispute Resolution at an Early Age*, 3 NEGOTIATION J. 277, 287 (1986) (asking "[w]hat if we saw conflict as an inevitable companion to living, a signal that change might be in order, and an opportunity for collaborative problem solving? What if we possessed a repertoire of responses to conflict,

zero-sum game conflicts—our adversarial system is yet another legal institution that, akin to the Agreement approach in contracts, helps implement a fundamentally atomistic metaphysics. And, like Reliance and Substantive Fairness under contract law, alternatives to the adversarial system remain,[465] but have been banished to the legal and intellectual peripheries.

Evidence law should be understood in light of the fact that it is part of the operationalization of the American adversarial system. In other words, rules of evidence are not pristine procedural edicts above the rough and tumble of politics. Rather, evidentiary rules are part of the legal edifice that shapes the character of society's citizens. Consider the 700 Rules, which permit each party to hire its own experts and prepare them in advance of trial. The financial and psychological inducements implicit in this regime of expert testimony encourage partisan testimony on the part of the experts, which only perpetuates the fact battle.[466] A similar critique can be levelled at the rules allowing pre-trial preparation of witnesses, for

> the witness often detects what the lawyer hopes to prove at the trial. If the witness desires to have the lawyer's client win the case, he will often, unconsciously, mold his story accordingly. Telling and re-telling it to the lawyer, he will honestly believe that his story, as he narrates it in court, is true, although it importantly deviates from what he originally believed.[467]

Lingering of the fact battle is only further abetted by the effete role played by judges in terms of judicial noticing of facts. Reluctance to remove factfinding from the jury encourages protracted belaboring of even relatively clear factual matters. The American evidentiary rules concerning general and expert witnesses are not inevitable. Far more efficient and less bellicose processes can be found in German law[468] and in American Article I adjudications.[469] Other cultures' legal systems contain rules that actively seek to counter the infusion of partisanship into

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and could use them with creativity, care, and confidence?").

464. *See* MARVIN FRANKEL, PARTISAN JUSTICE 3-69 (1981); ANNE STRICK, INJUSTICE FOR ALL 37-57 (1977).

465. *See supra* note 349 and accompanying text.

466. *See* Langbein, *supra* note 344, at 835-36; Lieberman & Henry, *supra* note 458, at 427.

467. JEROME FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE 86 (1949), *quoted in* Langbein, *supra* note 344, at 833.

468. *See* Langbein, *supra* note 344, at 833-57.

469. *See* DAVIS & PIERCE, *supra* note 342, at 391.

witnesses.[470] Viewed in this broader perspective, it can be seen that American rules of evidence are a handmaiden to the American adversarial system and, in that respect, to atomism.

Another example illustrating that the Federal Rules of Evidence advance a philosophy of atomism is not found directly in the Rules, but in a conspicuous absence: there is no general affirmative obligation to testify. Absent a subpoena, a person having information relevant to a litigation has the choice whether to provide that information to a court. Paralleling the Agreement theory, the duty to testify, generally speaking, is only that obligation that a person voluntarily takes upon herself. Under other societies' legal systems, by contrast, persons having information relevant to ongoing litigation have a general obligation to testify.[471] The underlying rationale of such duties reflects an ethic of interconnection and interpersonal responsibility; merely living in society produces obligations to other citizens, including the duty to do what is in one's power to avoid economic and other injustices from being inflicted on others by the legal system.[472]

More generally, the Federal Rules of Evidence's liberal admission policy and the lack of legally determined weights of different categories of evidence encourage profound wrangling among the parties, lay the groundwork for heavy reliance on cross-examination, and discourage settlement. To understand these consequences, consider the parol evidence rule, a doctrine usually conceived as part of contract, but which, at its core, is an evidentiary rule incorporating an approach at odds with the Code's dominant spirit and which quells fighting among the parties. The parol evidence rule belongs to the best evidence approach to evidence that predominated in seventeenth-century English law, which permitted production of only the most probative pieces of evidence.[473]

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470. *See* Langbein, *supra* note 344, at 833-40 (noting German rules regarding witnesses and experts); MAIMONIDES, *supra* note 461, at 1:4 (instructing judges to lead cross-examination of witnesses and warning them "to be most careful at time of cross-examination, lest the judge lead a witness to lie or misrepresent") (Jewish law).

471. *See, e.g.*, MAIMONIDES, *supra* note 461, at 1:1 (Jewish law).

472. Incorporating such an ethic into American evidentiary law would not be qualitatively novel, of course. American citizens already have several political duties, including jury duty, potential military duty, and the obligation to pay taxes.

473. Early English evidence law relied on the so-called "best evidence" approach, *see* William Twining, *The Rationalist Tradition of Evidence Scholarship*, *in* WELL AND TRULY TRIED 211, 213 (Enid Campbell & Louis Waller eds., 1982); Landsman, *supra* note 338, at 1151-55, which encouraged production of only the most probative pieces of evidence. The justification was that a party "must have the utmost Evidence, the Nature of the Fact is capable of . . . [for if] there is some more Evidence that doth not appear, the very not producing it is a Presumption, that it would have detected something more than appears already." *See* Landsman, *supra* note 338, at 1152 (citing GILBERT, *supra*

Undergirding the parol rule's general exclusion of testimony or other evidence extraneous to the written contract is the premise that the document is more reliable than other forms of proof regarding the parties' intent and that only the best evidence—not all potentially relevant evidence (the approach taken by the Federal Rules of Evidence)—should be admissible.[474] By favoring documentary evidence over testimony and limiting the scope of the jury's fact-finding responsibility, the rule eliminates considerable fighting among the parties and ousts any need for cross-examination over particularly fractious matters. Also, by making more certain the factual record with which both parties will have to work at trial, the rule eliminates the possibility that each party will interpret factual ambiguities in its favor while constructing his litigation strategy.[475] This diminution in uncertainty, which cuts against

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note 329, at 3-4). Under this system, the evidentiary *law*—not the jury—determined the reliability of different types of evidence in advance. For example, written evidence always prevailed over oral testimony, which was distrusted due to imperfect memory and omnipresent partiality, and, among documents, sealed records (official memorials of the courts and legislatures) were more reliable *by law* than unsealed records, and so on. Interestingly, most legal scholars do not view the parol evidence rule as a rule of evidence. *See* CORBIN, *supra* note 298, at 535 ("Although always referred to as the Parol Evidence Rule, it is not a rule as to the admissibility of testimony; instead, it is a rule of substantive law determining the legal operation of the written 'integration' above described."); 4 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 631, at 955 (3d ed. 1961) ("The parol evidence rule, in spite of its name, is not a rule of evidence . . . . The parol evidence rule is a rule of substantive law."). These (and other) legalists' views may be attributable to their having viewed the contemporary evidentiary regime—which favored liberal admission of evidence—as the only possible approach to evidence law. For example, Williston appears to justify his claim that the parol evidence rule is a matter of substantive law on the basis that "it defines the limits of a contract; it fixes the subject matter for interpretation, though not itself a rule of interpretation." *Id.* That, of course, is exactly what a rule of evidence does: it determines *what* material is to be subject to the factfinder's interpretation.

474. The parol evidence rule's prospective impact on the parties' behaviors only makes this presumption more true over time.

475. *See* Landsman, *supra* note 338, at 1152-53. Additionally, there were strict limitations regarding who was permitted to give testimony; only those who could be trusted to take seriously an Oath were permitted to testify, for "where the binding force of an Oath ceases, the Reasons and Grounds of Belief are absolutely dissolved." *Id.* at 1155 (quoting GILBERT, *supra* note 329, at 103). Since the Oath was viewed as the guarantor of subjectively honest testimony, *see id.* at 1155, there was little in-court interrogation of witnesses.

Gilbert's Best Evidence regime was a handmaiden to the relatively non-adversarial adjudication system. Establishing a legal hierarchy as to the comparative reliability of different categories of evidence and placing oral testimony on the bottom rung downplayed the role of cross-examination, which is a dominant feature of our adversarial system. *Cf. id.* at 592-95. For the argument that the significant changes in English evidentiary law between the sixteenth and nineteenth centuries are a result of the ascendence of the

advocates' tendencies to overestimate the strength of their cases, is an important inducement to settlement.[476]

Apart from a passing reference to "fairness in administration" in Rule 102, which has received little judicial attention,[477] the Federal Rules of Evidence do not consciously acknowledge their integral role in making America's adversarial litigation system operational. This perhaps explains why, though some recent scholars have devoted attention to how evidentiary law implements objectives of the litigation system,[478] these scholars have been few and far between.

Ignoring evidence law's role in connection to the overarching mode of dispute resolution, which can be attributed to the way the Federal Rules of Evidence were drafted, has been costly. Little attention, for example, has been paid to the ways in which evidence law, as part of the litigation system, shapes the community's sense of fairness.[479] Equally significant is the fact that little thought has been given to how the evidentiary rules otherwise shape the community.[480] Perhaps most importantly, little attention has been given to how the law of evidence, in conjunction with the adversarial system it helps operationalize, has shaped citizens' views as to how conflicts should be resolved. Relatedly, little

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adversarial system, *see id.* at 592-603.

476. *Cf.* 1 DAVIS & PIERCE, *supra* note 342, at 374 (noting that whether "the facts relevant to the dispute [are] relatively determinate . . . so that the parties are able to arrive at relatively close predictions of the likely results of formal resolution of the dispute" is requisite to settlement); George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 9-17 (1984) (arguing that uncertainty impedes settlement).

477. *See supra* part III.B.3.a.(2).

478. *See, e.g.*, Mark Cammack, *Evidence Rules and the Ritual Functions of Trials: "Saying Something or Something,"* 25 LOY. L.A. L. REV. 783, 795 (1992) (arguing that evidence law is instrumental in furthering the litigation system's interest in propagating the public's perception of distinct realms of "fact" and "law" that is the "premise for rational legal decision-making"); Nesson, *supra* note 343, at 1357-65, 1390 (explaining how evidence law helps realize the litigation system's educative function). Though these works are significant for having highlighted the need to analyze evidence law in the larger context of the litigation system, much work remains to be done.

479. *See* WIGMORE, *supra* note 36, § 6.5, at 457.

480. *See id.* This inattentiveness not only is attributable to, but also is a reflection and continuation of, the longstanding American legal tradition of distinguishing between "substantive" and "procedural" law. Under this view, it is only the substantive law that guides citizens' behaviors, while procedural law merely governs the processes by which substantive legal rights are vindicated.

The distinction is notoriously weak. In addition to the widely recognized impossibility of demarcating between substance and procedure, *see, e.g.*, JAMES & HAZARD, *supra* note 344, at 1-2, so-called "procedural" rules inevitably socialize citizens in diverse ways.

scholarly attention has been given to whether the litigation system's adversarial nature ought to be reshaped.[481]

The contemporary American tendency to view evidence law in isolation from larger systemic considerations is not an oversight made in all legal cultures. Under other legal systems, not only are scholars conscious of evidentiary rules' role within the legal system at large, but the evidence rules themselves also reflect systemic goals as well as "local" factfinding objectives.[482] The failure of American evidence scholars to appreciate the degree to which the evidentiary rules play an essential role in defining the role that adjudication plays in society is at least partly attributable to the way in which evidence law was codified. After all, the Federal Rules of Evidence are addressed only to the local level of factfinding; the limited number of policy concerns mentioned in

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481. *See supra* notes 344, 347-50 and accompanying text.

482. Jewish law provides a vivid example of an evidentiary system that is shaped by concerns for how the evidentiary rules impact larger systemic values in addition to local factfinding concerns. Like Gilbert's best evidence approach, Jewish law categorically excludes certain classes of persons from giving evidence, such as known liars and other "evil" people ("evil" was a technically defined legal category). *See* MAIMONIDES, *supra* note 461, at 9:1, 10:1-4 (listing persons excluded from giving testimony and defining who qualifies as an "evil" person). While getting to the "truth" is one of Jewish evidentiary laws' objectives, that system's witness exclusion laws, unlike Gilbert's approach, are not premised on truth-finding grounds; for example, the excluded parties are disallowed from testifying even where circumstances indicate that the party is telling the truth, *id.* at 10:1, and, further, judges have an obligation to subject to exacting cross-examination even those parties who are considered trustworthy enough to be allowed to take an oath or to testify. *Id.* at 1:4.

The categorical exclusions are instead due to other concerns. First, the exclusionary rules provided a disincentive for people to engage in "evil" behavior. Exclusion from testifying was a form of social approbation. Exclusion also meant that a person would be shunned in the business world, for the signatures of such persons on contracts would be worthless, since signatures functioned as testimony. *See* MAIMONIDES, *supra* note 461, at 3:6, 6:1-8.

The exclusionary rule also was designed to help keep upright people pure. Under the Jewish understanding of human psychology, a person's character traits are influenced by the company one keeps. *See* PIRKEY AVOT 1:7. The exclusionary rule discouraged social interactions with "evil" persons, thereby working to preserve the honorable. *See* BABYLONIAN TALMUD, SHAVUOT 30b (Tal Man 1982) (7th century C.E.). Further, denying certain evil-doers the right to testify was viewed as a means of preserving the dignity of judicial proceedings, whose reputation, it was believed, would be sullied by allowing certain people to participate direetly.

Finally, the exclusionary rules were viewed as being necessary to preserve people's respect for and awe of the oath, which would have been undercut had dishonest people taken the oath only to prevaricate. Relatedly, the exclusion preserved the dignity of the Divine, whose name was invoked while taking the oath.

In sum, Jewish law offers a paradigmatic example of evidentiary law that is consciously connected to systemic concerns as well as "local" factfinding objectives.

Rule 102 to guide judges do not include awareness of evidence's function at the systemic level.[483] The Code could have been drafted differently. But it was not. As law students' and practitioners' knowledge of evidence law becomes increasingly identified with mastery of the Federal Rules of Evidence, it becomes dangerously likely that evidentiary myopia will only advance.

### 3. MODEL PENAL CODE

The Model Penal Code offers yet another example of an idiosyncratic and particular spirit behind a code that appears to have shaped the law's post-code development and that socializes citizens. The seemingly innocuous "Purposes" clause of the Model Penal Code instructs that

> [t]he general purposes of the provisions governing the definition of offenses are (a) to forbid and prevent conduct that unjustifiably and inexcusably inflicts or threatens substantial harm to individual or public interests . . . .

Far from being neutral and obvious, this guiding principle lands the Model Penal Code squarely in one camp in a long-standing debate concerning the nature and consequent scope of criminal sanctions. The camp that has historically been dominant, which will be labelled the "Ethicist" approach, identifies the criminal sanction with society's moral outrage.[484] Criminal sanctions are deemed necessary for the definition and strengthening of society's moral sensibilities.[485] Indeed, according

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483. *See* FED. R. EVID. 102 (stating that the evidentiary rules "shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedingly justly determined"); FED. R. EVID. 403 (allowing for exclusion of relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence").

484. *See* 2 STEPHEN, *supra* note 332, at 81-82 ("The criminal law thus proceeds upon the principle that it is morally right to hate criminals, and it confirms and justifies that sentiment by inflicting upon criminals punishments which express it. . . . [T]his close alliance between criminal law and moral sentiment is in all ways healthy and advantageous to the community."); *see also* HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 262 (arguing that "only conduct generally considered 'immoral' should be treated as criminal").

485. *See, e.g.*, EMANUEL DURKHEIM, THE DIVISION OF LABOR IN SOCIETY 108-09 (1933) (punishment's "true function is to maintain social cohesion intact"; that is, to preserve the "common moral conscience"); Johannes Andenaes, *General Prevention—Illusion or Reality?*, 43 J. CRIM. L. & CRIMINOLOGY 176, 179-80 (1952) (the

to Ethicists, criminal law is part of what helps to provide the common intuitions that *constitute* a society. A second camp, which will be labelled "Consequentialist," views criminal sanctions as a means of regulating undesirable behaviors, indistinguishable from, say, monetary fines.[486] According to this second school, the stripping of freedom threatened by criminal sanctions lies on the extreme end of a continuum with other sanctions, and is to be invoked with respect to acts generating particularly large harms that society wishes to discourage. Ethicists respond to this characterization by warning that applying criminal sanctions beyond their appropriate bounds dilutes the very concept of community ethics. In turn, Consequentialists dispute the possibility or desirability of enforcing ethics and generating community values in a pluralist liberal state, or question the efficacy of using the law for value generation and reinforcement, variously arguing that enforcement would require overly-intrusive police interference with privacy, divert limited police resources to unproductive uses, and inevitably result in uneven enforcement of such laws.[487]

In contention between Ethicists and Consequentialists are the very same issues concerning the appropriate relationship between individuals in society that are disputed by advocates of the Agreement theory of contract and the adversarial system of litigation, on the one hand, and champions of Substantive Fairness and Reliance approaches to contract and supporters of alternatives to an adversarial-based procedural system, on the other.[488] Further, the Consequentialist approach to criminal sanctions, along with the Agreement theory of contracts and the adversarial approach to litigation, all grow out of an ethic of atomism that downplays the importance of social interconnection (or, at least, the role of the state's laws in creating community). Like supporters of the Substantive Fairness and Reliance approaches to obligation creation and of alternative dispute resolution mechanisms, by contrast, the ethicist in criminal law seeks to use the law to create a greater sense of trust and social connection among citizens.

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"concrete expression of society's disapproval of an act helps to form and to strengthen the public's moral code and thereby creates conscious and unconscious inhibitions against committing a crime"); Nesson, *supra* note 343, at 1360 ("[T]he law serves a moralizing, educative function: . . . [s]pecific punishment of particular law-breakers thus serves more to reinforce behavioral rules and moral values among the law-abiding than to heighten the potential law-breaker's fear of punishment.").

486. *See, e.g.*, Milner S. Ball & Barry Friedman, *The Use of Criminal Sanctions in the Enforcement of Economic Legislation: A Sociological View*, 17 STAN. L. REV. 197 (1965).

487. *See* Sanford H. Kadish, *The Crisis of Overcriminalization*, 374 ANNALS 156 (1967); Sanford H. Kadish, *Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations*, 30 U. CHI. L. REV. 423 (1963).

488. *See supra* text accompanying notes 376-85 (contract); 459-71 (procedure).

The Model Penal Code thus quietly situates itself in the camp of Consequentialists, identifying criminal sanctions as a means of "prevent[ing] conduct" that "threatens substantial harm."[489] As in contract and evidence law, then, the codification of criminal law has adopted a spirit advancing an ethic of atomism. And, as with the codifications of contract and evidence law, post Model Penal Code growth of the criminal law has taken the direction elected by the Code. Consistent with the Code's consequentialist spirit, recent legislation has criminalized nearly all knowing violations of federal law. Criminal sanctions are regularly included as part of the panoply of punishments accompanying economic legislation and other statutes that prohibit behaviors that may be unwanted, but that fall outside the purview of society's moral intuitions. A classic example are the criminal sanctions accompanying the antitrust laws,[490] which prohibit certain business practices that are only finely distinguishable from the types of aggressive competitive habits that are generally praised in our society.

The Ethicist might acknowledge the significant governmental interests connected to societal health and welfare, for example, in regulating the entry of vehicles from Mexico to ensure that the vehicles not carry insect pests or plant diseases[491] and in ensuring that anadromous fish, which

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489. To be sure, the Model Penal Code also lists among its "general purposes" the goal of "safeguard[ing] conduct that is without fault from condemnation as criminal." MODEL PENAL CODE § 1.02(1)(c). In theory, this so-called principle of "blameworthiness," *see* Kadish, *supra* note 2, at 1142, has two senses: blameworthy intent and blameworthy actions. In actuality, however, the Model Penal Code gives attention to only the first aspect of blameworthiness. *See* Part I Article 2 "General Principles of Liability" (covering §§ 2.01-2.13); Kadish, *supra* note 2, at 1142 (discussing only blameworthy intent, observing that "[t]he standard of just blaming tends to be the conventional common-law standard, which finds blame sufficiently established 'if the actor knew or should have known the facts' that give his conduct its offensive character" and that "[s]trict liability is eliminated"). Virtually no attention was given to providing a theoretical framework for determining which behaviors ought to be criminalized. *See* Herbert Packer, *The Model Penal Code and Beyond*, 63 COLUM. L. REV. 594, 605 (1963) (asking what remains to be done after the Model Penal Code and concluding that "a major task for the future is to examine the limits of the criminal law, to inquire into the criteria that ought to be taken into account in reaching wise legislative determinations about the behavior content of the criminal law . . . . [N]o one has attempted in any but the most general terms to suggest how decisions about the use of the criminal sanction should be made."); *see also* Frank J. Remington, *The Future of the Substantive Criminal Law Codification Movement—Theoretical and Practical Concerns*, 19 RUTGERS L. J. 867, 883-85 (1988). As a result, MODEL PENAL CODE § 1.02(1)(a), the consequentialist prescription, has alone filled the void of determining what types of behaviors ought to be governed by the criminal law.

490. 15 U.S.C. § 1 (1988).

491. 7 U.S.C. § 149 (1988).

are the subject of an international treaty, not be subject to fishing.[492] The Ethicist would nonetheless criticize the criminalization of the knowing circumvention of these statutes. She would argue that criminalization equates violation of these laws with, for example, assault and battery, thereby undercutting the moral outrage properly associated with the criminal sanction. While an irrelevancy to the consequentialist, this lack of fit between prohibited activities and moral outrage dilutes the moral force of the criminal law, according to the ethicist.[493]

There are good reasons to believe that the surge in the offenses that have been criminalized is not merely correlated with, but is causatively linked to, the Model Penal Code's election of the consequentialist approach to criminal law. The Model Penal Code has had an immense impact on federal and state criminal law due to the disarray of the pre-Code theories of criminality,[494] the highly-esteemed legalists who were involved in the Model Penal Code (notably, Herbert Wechsler), and the generally recognized high quality of the Model Penal Code.[495] As a result of all these factors, the Code has been viewed as an authoritative and reliable statement of criminal theory that has significantly, if not unilaterally, shaped the jurisprudential environment within which subsequent criminal law has emerged.[496] When seeking to further the

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492. 16 U.S.C § 5010 (1988).

493. *See, e.g.*, F. Allen, The Criminal Law as an Instrument of Economic Regulation 2 (1976) (International Institute of Economic Research) (Orig. Paper 2), *quoted in* SANFORD H. KADISH ET AL., CRIMINAL LAW AND ITS PROCESSES 990 (2d ed 1969) ("If criminal punishments are limited to behavior perceived by the community to involve some kind of moral dereliction, government is restrained in its persistent tendency to employ the criminal law for whatever purposes it considers desirable or expedient . . . . [This is a problem with respect to statutes criminalizing actions relating to economic regulation because] nothing approaching a consensus has been reached on the moral issue in much 'economic' behavior, and hence the law is denied the kind of general support necessary for its most effective operation . . . . The long-term effect is to demoralize the administration of justice and to weaken the community's attachment to the law.").

Some academics have suggested an alternative to over-criminalization which would generate a third category of sanctions that is a hybrid of the purely civil and the purely criminal/morally contemptible. *See* PACKER, *supra* note 484, at 265.

494. *See* Herbert Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097 (1960).

495. *See generally* Symposium, *The Model Penal Code*, 63 COLUM. L. REV. 589 (1963) (symposium on the Model Penal Code where scholar after scholar heaped praise on the codification).

496. *See, e.g.*, State v. Harmon, 516 A.2d 1047, 1055 n.8 (N.J. 1986) (looking to the "[t]he Model Penal Code, upon which our Code's general principles of liability and culpability are conceptually based," although the Code sections were "not the direct source for our own sections").

There are many ways of gauging the Model Code's impact. Although only Pennsylvania and New Jersey have adopted the bulk of the Model Penal Code, many more

criminal law, therefore, it is likely that legalists have been guided by the Model Penal Code. And the foremost theory in the Code of *what* acts should be treated via the criminal law is the consequentialist theory.

## V. CONCLUSIONS

Over the past seventy-five years a significant part of the common law has been codified. The recent American codifications of the common law belong to the Perpetual Index school, aspiring to codify only a subset of the entirety of the private law and recognizing that, despite this aspiration, they cannot be comprehensive and final statements of that subset. Related to this, the American codes have not sought to wholly cut themselves off from their common law past: many of the codes incorporate pre-code equitable doctrines and some of the code rules themselves are defined by reference to pre-code caselaw. Additionally, most of the American codes acknowledge that law is never "finalized," and invite the judiciary and the legislature to join in the law's subsequent development.

Notwithstanding the codes' connection to the past and the codes' recognition that the codified law must continue to grow, the codes have had a significant impact on legal practice. The text of the codes frequently is the sole legal source consulted for determining the law. An overwhelming percentage of the time the text of the code is the starting point in determining the law. Only occasionally are the codes' texts ignored or transformed.

The study of, and comparisons among, the American codes also show the inaccuracy of referring to the American codes monolithically. The American codes differ in the extent to which they use rules and standards; their sensitivity to differing factual contexts; the equitable adjustments they allow judges; the invitations they issue to the judiciary and legislature to join in the development of the law; and the codes's respective relationships to common law predecessors. The differences among the codes engender different patterns of interpretation. These

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have adopted significant parts of the Code. Many state legislatures that have not adopted the Model Penal Code have looked to the Code for guidance in the drafting of their Codes. *See, e.g.*, People v. Marrero, 515 N.Y.S.2d 212 (1987) ("Although the drafters of the New York statute did not adopt the precise language of the Model Penal Code provision . . . , it is evident and has long been believed that the Legislature intended the New York statute to be similarly construed. *In fact, the legislative history of section 15.20 is replete with references to the influence of the Model Penal Code provision . . .* .") (emphasis added). Finally, the courts in many non-Code jurisdictions have looked to the Model Penal Code for assistance in developing their law. *See, e.g.*, United States v. Jewell, 532 F.2d 697 (9th Cir. 1976) (looking to MODEL PENAL CODE § 2.02(7) in determining whether willful ignorance constitutes "knowingly" for the purposes of federal criminal laws concerning transportation of narcotics).

various code characteristics also are largely determinative of the codification's jurisprudential aftermath: the extent to which the codes constrain the judicial decisionmaker from doing "justice" in the individual case and limit the potential for the law's future growth. In the end, nearly all the American codes contain provisions that retain judicial discretion and prevent total cessation of the law's subsequent development.

But the presence of code provisions encouraging continued judicial development of the law does not mean that post-codification legal growth has been unfettered. The codes' scopes, schemes, and spirits all are nonobvious and nonaxiomatic, and they materially impact post-codification legal growth in diverse ways. A code's chosen "scope" implicitly defines some subset of the law as constituting a discrete doctrinal field. The code's scope thereby demarcates the area within which rule-consistency is expected; determines what facts are legally irrelevant and thus need not be considered; and encourages bureaucratization of the law, where hyperspecialists fail to examine the larger structural aspects of the legal system that are largely determinative of their hyperspecialties, a phenomenon that masks possibilities for reform of basic components of the legal system. Each code also employs a particular organizational "scheme," which emphasizes some and masks other policy concerns that are operative within the doctrinal field. Finally, each code incorporates a particular overarching spirit within its doctrine that simultaneously encourages and deters certain ideas and behaviors. The spirits animate post-code growth in select ways, and the code's educative power assimilates alternative spirits into the codes' orientation. In short, the very benefit of codification pointed to by Holmes and other proponents of the Meta-Scheme model[497] has become codification's most significant danger: by "philosophically arrang[ing] the *corpus juris*" and providing lawyers a ready picture of what constitutes distinct legal fields and how they interrelate, codification threatens to freeze the current conceptual schemes under which lawyers make sense of the morass of the law. It is at the levels of scope, scheme, and spirit that codification is most threatening to the law's continuing growth.

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497. *See supra* part I.A.4.

## VI. *Appendix One: Tabular Summaries of the Study's Findings*

**Figure 6**

**Number of instances each interpretive approach was utilized**

| | Number of issues | Suspenders | Contextualization | Concretization | Ambiguity/ Conflict | Lacuna | Supplement | Substitution | Transformation | Noise |
|---|---|---|---|---|---|---|---|---|---|---|
| Early UCC | 148 | 13 | 11 | 22 | 1 | 1 | 1 | 7 | 2 | 2 |
| Late UCC | 190 | 40 | 3 | 41 | 10 | 4 | 6 | 15 | 3 | 3 |
| Total UCC | 338 | 53 | 14 | 63 | 11 | 5 | 7 | 22 | 5 | 5 |
| Early FRE | 126 | 16 | 10 | 25 | 6 | 6 | 7 | 9 | 0 | 0 |
| Late FRE | 193 | 20 | 1 | 80 | 11 | 3 | 8 | 18 | 1 | 0 |
| Total FRE | 319 | 36 | 11 | 105 | 17 | 9 | 15 | 27 | 1 | 0 |
| GRAND TOTAL | 657 | 89 | 25 | 168 | 28 | 14 | 22 | 49 | 6 | 5 |

**Figure 7**

**Number of cases cited over the course of each hermeneutic technique**

**Number of instances each interpretive approach was utilized**

| | Number of issues | Suspenders | Contextuali-ualization | Concreti-zation | Ambiguity/ Conflict | Lacuna | Supple-ment | Substi-tution | Transforma-tion | Noise |
|---|---|---|---|---|---|---|---|---|---|---|
| Early UCC | 148 | 18 | 25 | 48 | 1 | 1 | 3 | 13 | 3 | 4 |
| Late UCC | 190 | 80 | 12 | 167 | 65 | 4 | 19 | 23 | 3 | 12 |
| Total UCC | 338 | 98 | 37 | 215 | 66 | 5 | 22 | 36 | 6 | 16 |
| Early FRE | 126 | 32 | 54 | 88 | 28 | 12 | 15 | 21 | 0 | 0 |
| Late FRE | 193 | 30 | 1 | 169 | 21 | 8 | 24 | 26 | 2 | 0 |
| Total FRE | 319 | 62 | 55 | 257 | 49 | 20 | 39 | 47 | 2 | 0 |
| GRAND TOTAL | 657 | 160 | 92 | 472 | 115 | 25 | 61 | 83 | 8 | 16 |

## VII. *Appendix Two: The Study's Raw Data*

Table 8
RAW DATA

Legend: Data regarding 1 UCC 1, the first case in the table, would be read as follows: of the 6 Code issues appearing in that reported case, one Code issue was resolved by reference to a single pre-Code case for the purpose of contextualization, and five Code issues were resolved solely by reference to the Code itself.

| Case | Number of issues | Pre-Code cases | Post-Code cases | Article/ Treatises | Suspenders | Contextualization | Concretization | Ambiguity/ Conflict | Lacuna | Supplement | Substitute | Transformation | Noise |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 1 UCC 1 | 1 | 1 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 5 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| 1 UCC 5 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 0 | 1 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 |
| 1 UCC 8 | 1 | 4 | 0 | 0 | 4 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 |
| | 3 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| 1 UCC 24 | 2 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| 1 UCC 33 | 3 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 0 | 1 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 0 | 1 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| 1 UCC 40 | 2 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 4 | 0 | 1 | 0 | 0 | 5 | 0 | 0 | 0 | 0 | 0 | 0 |
| 1 UCC 46 | 1 | 0 | 0 | 1 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |

Table 8 (continued)
RAW DATA

| Case | Number of issues | Pre-Code cases | Post-Code cases | Article/ Treatises | Suspenders | Contextuali-zation | Concreti-zation | Ambiguity/ Conflict | Lacuna | Supplement | Substitute | Transforma-tion | Noise |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 1 UCC 49 | 1 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 0 |
| | 1 | 1 | 0 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 |
| 1 UCC 55 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 0 |
| 1 UCC 57 | 3 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| 1 UCC 63 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 1 | 0 | 1 | 0 | 0 | 2 | 0 | 0 | 0 | 0 | 0 | 0 |
| 1 UCC 67 | 1 | 2 | 0 | 0 | 0 | 0 | 2 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 0 | 1 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| 1 UCC 73 | 1 | 2 | 0 | 0 | 0 | 0 | 2 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 2 | 0 | 0 | 0 | 2 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 3 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 3 | 0 | 0 |
| 1 UCC 84 | 1 | 1 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 0 |
| 1 UCC 85 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 3 | 0 | 0 | 0 | 0 | 3 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 2 | 0 | 0 | 0 | 0 | 2 | 0 | 0 | 0 | 0 | 0 | 0 |

Table 8 (continued)
RAW DATA

| Case | Number of issues | Pre-Code cases | Post-Code cases | Article/ Treatises | Suspenders | Contextualization | Concretization | Ambiguity/ Conflict | Lacuna | Supplement | Substitute | Transformation | Noise |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 1 UCC 49 | 1 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 0 |
| | 1 | 1 | 0 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 |
| 1 UCC 55 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 0 |
| 1 UCC 57 | 3 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| 1 UCC 63 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 1 | 0 | 1 | 0 | 0 | 2 | 0 | 0 | 0 | 0 | 0 | 0 |
| 1 UCC 67 | 1 | 2 | 0 | 0 | 0 | 0 | 2 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 0 | 1 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| 1 UCC 73 | 1 | 2 | 0 | 0 | 0 | 0 | 2 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 2 | 0 | 0 | 0 | 2 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 3 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 3 | 0 | 0 |
| 1 UCC 84 | 1 | 1 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 0 |
| 1 UCC 85 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 3 | 0 | 0 | 0 | 0 | 3 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 2 | 0 | 0 | 0 | 0 | 2 | 0 | 0 | 0 | 0 | 0 | 0 |

Table 8 (continued)
RAW DATA

| Case | Number of issues | Pre-Code cases | Post-Code cases | Article/ Treatises | Suspenders | Contextuali-zation | Concreti-zation | Ambiguity/ Conflict | Lacuna | Supplement | Substitute | Transforma-tion | Noise |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | 1 | 3 | 0 | 0 | 0 | 0 | 3 | 0 | 0 | 0 | 0 | 0 | 0 |
| 1 UCC 88 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 2 | 0 | 0 | 0 | 0 | 2 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 2 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 2 | 0 | 0 |
| 1 UCC 90 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 1 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| 1 UCC 93 | 1 | 1 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| 1 UCC 95 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| 1 UCC 96 | 2 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 3 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 3 | 0 | 0 |
| | 1 | 2 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 2 | 0 | 0 |
| 1 UCC 97 | 1 | 2 | 0 | 0 | 0 | 0 | 2 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 2 | 0 | 0 | 2 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| 1 UCC 100 | 1 | 3 | 0 | 0 | 0 | 2 | 0 | 0 | 0 | 0 | 0 | 1 | 0 |
| | 1 | 4 | 0 | 0 | 0 | 0 | 4 | 0 | 0 | 0 | 0 | 0 | 0 |
| 1 UCC 104 | 3 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 1 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |

Table 8 (continued)
RAW DATA

| Case | Number of issues | Pre-Code cases | Post-Code cases | Article/ Treatises | Suspenders | Contextuali-zation | Concreti-zation | Ambiguity/ Conflict | Lacuna | Supplement | Substitute | Transforma-tion | Noise |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 1 UCC 107 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 1 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 2 | 0 |
| 1 UCC 110 | 1 | 13 | 0 | 0 | 0 | 12 | 1 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 2 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| 2 UCC 1 | 3 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| 2 UCC 3 | 2 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 3 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 3 | 0 | 0 | 0 |
| 2 UCC 7 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| 2 UCC 14 | 1 | 0 | 1 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 1 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| 2 UCC 16 | 2 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 1 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| 2 UCC 20 | 2 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 3 | 0 | 0 | 0 | 0 | 3 | 0 | 0 | 0 | 0 | 0 | 0 |
| 2 UCC 22 | 3 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| 2 UCC 26 | 2 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| 2 UCC 37 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 1 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |

Table 8 (continued)
RAW DATA

| Case | Number of issues | Pre-Code cases | Post-Code cases | Article/ Treatises | Suspenders | Contextualization | Concretization | Ambiguity/ Conflict | Lacuna | Supplement | Substitute | Transformation | Noise |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | 1 | 1 | 0 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 1 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 |
| 2 UCC 40 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 2 | 0 | 2 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| 2 UCC 44 | 12 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| 2 UCC 56 | 5 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| 2 UCC 66 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| 2 UCC 82 | 4 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 1 | 0 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 |
| 2 UCC 88 | 1 | 5 | 0 | 0 | 0 | 0 | 5 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 4 | 0 | 0 | 0 | 0 | 4 | 0 | 0 | 0 | 0 | 0 | 0 |
| 2 UCC 92 | 3 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 1 | 0 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 |
| 2 UCC 97 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 3 | 0 | 0 | 0 | 2 | 1 | 0 | 0 | 0 | 0 | 0 | 0 |
| 2 UCC 100 | 1 | 1 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 1 | 0 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 |
| 2 UCC 102 | 1 | 1 | 0 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 |

Table 8 (continued)
RAW DATA

| Case | Number of issues | Pre-Code cases | Post-Code cases | Article/ Treatises | Suspenders | Contextualization | Concretization | Ambiguity/ Conflict | Lacuna | Supplement | Substitute | Transformation | Noise |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 2 UCC 104 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 0 | 1 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| 2 UCC 108 | 5 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| 2 UCC 110 | 4 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 2 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 3 |
| | 1 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 |
| 2 UCC 127 | 2 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 1 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| 2 UCC 133 | 2 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 1 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| 41 UCC 1 | 2 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 3 | 0 | 0 | 0 | 0 | 3 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 0 |
| | 1 | 0 | 1 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| 41 UCC 15 | 2 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 2 | 0 | 0 | 0 | 2 | 0 | 0 | 0 | 0 | 0 | 0 |
| 41 UCC 20 | 1 | 0 | 2 | 0 | 0 | 0 | 2 | 0 | 0 | 0 | 0 | 0 | 0 |

Table 8 (continued)
RAW DATA

| Case | Number of issues | Pre-Code cases | Post-Code cases | Article/ Treatises | Suspenders | Contextuali-zation | Concreti-zation | Ambiguity/ Conflict | Lacuna | Supplement | Substitute | Transforma-tion | Noise |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 41 UCC 27 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 1 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 1 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 |
| 41 UCC 29 | 5 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| 41 UCC 32 | 1 | 6 | 0 | 0 | 0 | 6 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 1 | 0 | 1 | 0 | 0 | 2 | 0 | 0 | 0 | 0 | 0 | 0 |
| 41 UCC 38 | 9 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 1 | 4 | 3 | 0 | 0 | 0 | 0 | 0 | 8 | 0 | 0 | 0 |
| | 1 | 0 | 3 | 2 | 0 | 0 | 5 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 1 | 0 | 1 | 2 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 3 | 0 | 3 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 6 | 0 | 0 | 0 | 6 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 0 | 2 | 2 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 1 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| 41 UCC 46 | 1 | 0 | 2 | 0 | 2 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| 41 UCC 49 | 2 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| 41 UCC 50 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 0 |

Table 8 (continued)
RAW DATA

| Case | Number of issues | Pre-Code cases | Post-Code cases | Article/ Treatises | Suspenders | Contextualization | Concretization | Ambiguity/ Conflict | Lacuna | Supplement | Substitute | Transformation | Noise |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | 1 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 0 |
| | 1 | 0 | 1 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 |
| 41 UCC 54 | 4 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 1 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 1 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| 41 UCC 58 | 2 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 1 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| 41 UCC 63 | 1 | 0 | 10 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 10 |
| | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 3 | 0 | 0 | 0 | 0 | 3 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 1 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| 42 UCC 74 | 2 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 2 | 0 | 0 | 0 | 2 | 0 | 0 | 0 | 0 | 0 | 0 |
| 42 UCC 79 | 2 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| 42 UCC 81 | 2 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 2 | 1 | 0 | 0 | 3 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 0 | 3 | 3 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |

Table 8 (continued)
RAW DATA

| Case | Number of issues | Pre-Code cases | Post-Code cases | Article/ Treatises | Suspenders | Contextuali-zation | Concreti-zation | Ambiguity/ Conflict | Lacuna | Supplement | Substitute | Transforma-tion | Noise |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | 1 | 0 | 1 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 0 |
| | 1 | 0 | 2 | 1 | 0 | 0 | 3 | 0 | 0 | 0 | 0 | 0 | 0 |
| 42 UCC 88 | 1 | 0 | 4 | 0 | 4 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| 42 UCC 92 | 2 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 1 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| 42 UCC 96 | 1 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 |
| 42 UCC 100 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| 42 UCC 107 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 1 | 0 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 1 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 |
| 42 UCC 114 | 1 | 0 | 3 | 2 | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 0 |
| | 1 | 0 | 1 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 3 | 0 | 3 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 3 | 0 | 3 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 3 | 2 | 5 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 1 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 3 | 3 | 6 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |

Table 8 (continued)
RAW DATA

| Case | Number of issues | Pre-Code cases | Post-Code cases | Article/ Treatises | Suspenders | Contextualization | Concretization | Ambiguity/ Conflict | Lacuna | Supplement | Substitute | Transformation | Noise |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | 1 | 0 | 1 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 1 | 2 | 0 | 3 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 |
| 42 UCC 126 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 0 | 1 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 8 | 1 | 9 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 0 | 1 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 0 | 1 | 5 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| 42 UCC 131 | 3 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 1 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 1 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| 18 UCC2d 1 | 1 | 0 | 22 | 5 | 0 | 0 | 27 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 2 | 0 | 0 | 0 | 0 | 0 | 0 | 2 | 0 | 0 | 0 |
| | 1 | 0 | 1 | 1 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 1 |
| 18 UCC2d 16 | 1 | 0 | 31 | 4 | 0 | 0 | 35 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 |
| 18 UCC2d 26 | 1 | 0 | 3 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 3 | 0 | 0 |

Table 8 (continued)
RAW DATA

| Case | Number of issues | Pre-Code cases | Post-Code cases | Article/ Treatises | Suspenders | Contextuali-zation | Concreti-zation | Ambiguity/ Conflict | Lacuna | Supplement | Substitute | Transforma-tion | Noise |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 18 UCC2d 29 | 5 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 4 | 0 | 0 | 0 | 4 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 4 | 0 | 0 | 0 | 4 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 1 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 |
| 18 UCC2d 43 | 1 | 0 | 2 | 2 | 0 | 0 | 4 | 0 | 0 | 0 | 0 | 0 | 0 |
| 18 UCC2d 55 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| 18 UCC2d 61 | 1 | 0 | 1 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 2 | 0 | 2 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 2 | 0 | 2 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 3 | 0 | 0 | 3 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 1 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| 18 UCC2d 69 | 1 | 0 | 11 | 0 | 0 | 0 | 0 | 11 | 0 | 0 | 0 | 0 | 0 |
| 18 UCC2d 77 | 1 | 0 | 2 | 0 | 0 | 0 | 0 | 2 | 0 | 0 | 0 | 0 | 0 |
| 19 UCC2d 1 | 1 | 0 | 1 | .0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 |
| 19 UCC2d 6 | 1 | 0 | 10 | 0 | 0 | 0 | 0 | 10 | 0 | 0 | 0 | 0 | 0 |

Table 8 (continued)
RAW DATA

| Case | Number of issues | Pre-Code cases | Post-Code cases | Article/ Treatises | Suspenders | Contextuali-zation | Concreti-zation | Ambiguity/ Conflict | Lacuna | Supplement | Substitute | Transforma-tion | Noise |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | 1 | 0 | 5 | 0 | 0 | 0 | 0 | 0 | 0 | 5 | 0 | 0 | 0 |
| 19 UCC2d 13 | 1 | 0 | 1 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 0 |
| | 1 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 0 |
| | 1 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 0 |
| | 1 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 0 |
| 19 UCC2d 18 | 1 | 1 | 1 | | 0 | 0 | 2 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 3 | 0 | 0 | 0 | 3 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 3 | 0 | 0 | 0 | 3 | 0 | 0 | 0 | 0 | 0 | 0 |
| 19 UCC2d 21 | 2 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 8 | 1 | 0 | 0 | 9 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 4 | 0 | 0 | 0 | 4 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 3 | 0 | 0 | 0 | 3 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 1 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 3 | 0 | 0 | 0 | 3 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 2 | 0 | 0 | 0 | 2 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 1 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |

Table 8 (continued)
RAW DATA

| Case | Number of issues | Pre-Code cases | Post-Code cases | Article/ Treatises | Suspenders | Contextuali-zation | Concreti-zation | Ambiguity/ Conflict | Lacuna | Supplement | Substitute | Transforma-tion | Noise |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | 1 | 0 | 1 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 2 | 0 | 2 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| 19 UCC2d 38 | 2 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 4 | 1 | 0 | 0 | 0 | 5 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 1 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| 19 UCC2d 45 | 2 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 0 |
| 19 UCC2d 50 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 1 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 1 | 2 | 0 | 0 | 1 | 0 | 0 | 2 | 0 | 0 | 0 |
| | 1 | 0 | 3 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 3 | 0 | 0 |
| | 1 | 0 | 2 | 0 | 0 | 0 | 2 | 0 | 0 | 0 | 0 | 0 | 0 |
| 19 UCC2d 53 | 1 | 0 | 2 | 0 | 2 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 13 | 0 | 0 | 0 | 0 | 13 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 1 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 |

Table 8 (continued)
RAW DATA

| Case | Number of issues | Pre-Code cases | Post-Code cases | Article/ Treatises | Suspenders | Contextuali-zation | Concreti-zation | Ambiguity/ Conflict | Lacuna | Supplement | Substitute | Transforma-tion | Noise |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | 1 | 0 | 1 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 |
| 19 UCC2d 60 | 3 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 2 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 2 | 0 | 0 |
| | 1 | 0 | 2 | 0 | 0 | 0 | 2 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 9 | 1 | 0 | 0 | 0 | 10 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 0 |
| | 1 | 0 | 2 | 0 | 2 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 1 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 |
| 19 UCC2d 73 | 3 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 1 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 7 | 0 | 0 | 0 | 7 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 1 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 2 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 3 | 0 | 0 |
| | 1 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 0 |
| | 1 | 0 | 2 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 2 | 0 | 0 |
| 19 UCC2d 90 | 4 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 0 | 0 |

Table 8 (continued)
RAW DATA

| Case | Number of issues | Pre-Code cases | Post-Code cases | Article/ Treatises | Suspenders | Contextuali-zation | Concreti-zation | Ambiguity/ Conflict | Lacuna | Supplement | Substitute | Transforma-tion | Noise |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | 1 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 0 | 0 |
| | 1 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 |
| 19 UCC2d 106 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 6 | 0 | 0 | 0 | 0 | 6 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 6 | 0 | 0 | 0 | 6 | 0 | 0 | 0 | 0 | 0 | 0 |
| 19 UCC2d 113 | 1 | 0 | 3 | 1 | 0 | 0 | 0 | 4 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 2 | 0 | 0 | 0 | 2 | 0 | 0 | 0 | 0 | 0 | 0 |
| 19 UCC2d 119 | 1 | 0 | 4 | 0 | 0 | 0 | 4 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| 1FRE 1 | 1 | 1 | 0 | 3 | 3 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 7 | 0 | 2 | 0 | 8 | 0 | 0 | 0 | 0 | 1 | 0 | 0 |
| | 1 | 19 | 0 | 0 | 0 | 0 | 19 | 0 | 0 | 0 | 0 | 0 | 0 |
| 1FRE 56 | 1 | 10 | 0 | 0 | 0 | 0 | 10 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 3 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 3 | 0 | 0 | 0 |
| | 4 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 3 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 3 | 0 | 0 | 0 |
| | 1 | 3 | 0 | 1 | 0 | 0 | 4 | 0 | 0 | 0 | 0 | 0 | 0 |

Table 5 (continued)
RAW DATA

| Case | Number of issues | Pre-Code cases | Post-Code cases | Article/ Treatises | Suspenders | Contextualization | Concretization | Ambiguity/ Conflict | Lacuna | Supplement | Substitute | Transformation | Noise |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 1FRE 67 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| 1FRE 71 | 3 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| 1FRE 77 | 1 | 0 | 0 | 2 | 0 | 0 | 2 | 0 | 0 | 0 | 0 | 0 | 0 |
| 1FRE 80 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| 1FRE 82 | 1 | 1 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 2 | 0 | 1 | 0 | 0 | 3 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 3 | 0 | 1 | 0 | 0 | 4 | 0 | 0 | 0 | 0 | 0 | 0 |
| 1FRE 90 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| 1FRE 92 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| 1FRE 104 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| 1FRE 105 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| 1FRE 109 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| 1FRE 122 | 1 | 2 | 0 | 4 | 1 | 5 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| 1FRE 128 | 5 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 3 | 0 | 1 | 0 | 2 | 2 | 0 | 0 | 0 | 0 | 0 | 0 |
| 1FRE 141 | 2 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| 1FRE 147 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |

Table 8 (continued)
RAW DATA

| Case | Number of issues | Pre-Code cases | Post-Code cases | Article/ Treatises | Suspenders | Contextuali-zation | Concreti-zation | Ambiguity/ Conflict | Lacuna | Supplement | Substitute | Transforma-tion | Noise |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | 1 | 0 | 2 | 1 | 3 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 2 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 3 | 0 | 0 | 0 |
| | 1 | 2 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 3 | 0 | 0 |
| | 1 | 2 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 3 | 0 | 0 | 0 |
| | 1 | 4 | 0 | 0 | 4 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 3 | 0 | 2 | 0 | 0 | 5 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 2 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 2 | 0 | 0 |
| 1FRE 162 | 1 | 2 | 0 | 0 | 0 | 0 | 0 | 0 | 2 | 0 | 0 | 0 | 0 |
| | 1 | 2 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 2 | 0 | 0 |
| | 1 | 2 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 3 | 0 | 0 |
| | 1 | 5 | 0 | 0 | 0 | 5 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 2 | 1 | 0 | 0 | 3 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 10 | 0 | 0 | 0 | 0 | 10 | 0 | 0 | 0 | 0 | 0 |
| 1FRE 181 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| 1FRE 193 | 4 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| 1FRE 222 | 1 | 0 | 1 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 1 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 3 | 0 | 4 | 1 | 0 | 6 | 0 | 0 | 0 | 0 | 0 | 0 |

Table 8 (continued)
RAW DATA

| Case | Number of issues | Pre-Code cases | Post-Code cases | Article/ Treatises | Suspenders | Contextualization | Concretization | Ambiguity/ Conflict | Lacuna | Supplement | Substitute | Transformation | Noise |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 1FRE 233 | 1 | 6 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 7 | 0 | 0 |
| | 1 | 2 | 0 | 4 | 0 | 0 | 6 | 0 | 0 | 0 | 0 | 0 | 0 |
| 1FRE 239 | 1 | 0 | 1 | 1 | 0 | 0 | 2 | 0 | 0 | 0 | 0 | 0 | 0 |
| 1FRE 243 | 1 | 10 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 1 | 1 | 0 | 0 | 2 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| 1FRE 248 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| 1FRE 255 | 1 | 0 | 0 | 1 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| 2FRE 2 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| 2FRE 9 | 1 | 1 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 5 | 0 | 0 | 0 | 5 | 0 | 0 | 0 | 0 | 0 | 0 |
| 2FRE 13 | 1 | 3 | 0 | 0 | 3 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| 2FRE 16 | 2 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 1 | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 1 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| 2FRE 24 | 1 | 2 | 0 | 0 | 0 | 0 | 1 | 0 | 0 | 1 | 0 | 0 | 0 |
| | 1 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 0 | 0 |

Table 8 (continued)
RAW DATA

| Case | Number of issues | Pre-Code cases | Post-Code cases | Article/ Treatises | Suspenders | Contextuali-zation | Concreti-zation | Ambiguity/ Conflict | Lacuna | Supplement | Substitute | Transforma-tion | Noise |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | 1 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 0 | 0 |
| 2FRE 26 | 1 | 5 | 0 | 0 | 0 | 5 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 8 | 0 | 0 | 0 | 8 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 2 | 0 | 2 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 2 | 0 | 0 | 0 | 0 | 0 | 0 | 2 | 0 | 0 | 0 | 0 |
| 2FRE 32 | 2 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| 2FRE 33 | 2 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 4 | 1 | 2 | 0 | 0 | 0 | 7 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 1 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 2 | 0 | 0 | 2 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 1 | 3 | 0 | 0 | 0 | 4 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 |
| 2FRE 44 | 2 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 1 | 1 | 0 | 0 | 2 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 4 | 4 | 0 | 0 | 0 | 0 | 8 | 0 | 0 | 0 | 0 | 0 |
| 2FRE 49 | 1 | 0 | 2 | 0 | 0 | 0 | 2 | 0 | 0 | 0 | 0 | 0 | 0 |
| 2FRE 51 | 2 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 1 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |

Table 8 (continued)
RAW DATA

| Case | Number of issues | Pre-Code cases | Post-Code cases | Article/ Treatises | Suspenders | Contextuali-zation | Concreti-zation | Ambiguity/ Conflict | Lacuna | Supplement | Substitute | Transforma-tion | Noise |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 2FRE 54 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| 2FRE 56 | 1 | 0 | 3 | 1 | 0 | 0 | 0 | 0 | 4 | 0 | 0 | 0 | 0 |
| 2FRE 60 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| 2FRE 63 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 0 | 1 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 |
| 2FRE 69 | 1 | 1 | 2 | 0 | 3 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 1 | 0 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 4 | 0 | 0 | 4 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| 2FRE 73 | 2 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| 2FRE 77 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 1 | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 2 | 0 | 0 | 0 | 0 | 0 | 2 | 0 | 0 | 0 | 0 |
| 2FRE 82 | 1 | 3 | 1 | 0 | 0 | 3 | 1 | 0 | 0 | 0 | 0 | 0 | 0 |
| 2FRE 87 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 6 | 0 | 0 | 0 | 6 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| 2FRE 93 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| 2FRE 94 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 0 |

Table 8 (continued)
RAW DATA

| Case | Number of issues | Pre-Code cases | Post-Code cases | Article/ Treatises | Suspenders | Contextuali-zation | Concreti-zation | Ambiguity/ Conflict | Lacuna | Supplement | Substitute | Transforma-tion | Noise |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | 1 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 0 |
| 2FRE 96 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| 2FRE 100 | 2 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 1 | 0 | 1 | 1 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 0 |
| 2FRE 109 | 2 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 1 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 |
| 36FRE 629 | 1 | 0 | 3 | 0 | 1 | 0 | 2 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 1 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| 36FRE 633 | 2 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 2 | 0 | 0 | 0 | 0 | 2 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 2 | 0 | 0 | 0 | 2 | 0 | 0 | 0 | 0 | 0 | 0 |
| 36FRE 642 | 2 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 1 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 3 | 0 | 0 | 0 | 0 | 3 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 2 | 0 | 0 | 0 | 0 | 2 | 0 | 0 | 0 | 0 | 0 |
| 36FRE 653 | 1 | 0 | 4 | 0 | 0 | 0 | 2 | 0 | 0 | 0 | 2 | 0 | 0 |
| 36FRE 668 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |

Table 8 (continued)
RAW DATA

| Case | Number of issues | Pre-Code cases | Post-Code cases | Article/ Treatises | Suspenders | Contextuali-zation | Concreti-zation | Ambiguity/ Conflict | Lacuna | Supplement | Substitute | Transforma-tion | Noise |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 36FRE 671 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 0 |
| | 1 | 0 | 3 | 0 | 0 | 0 | 3 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 2 | 0 | 0 | 0 | 2 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 2 | 0 | 0 | 0 | 2 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 1 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 6 | 0 | 0 | 0 | 6 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 2 | 0 | 2 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 1 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 |
| 36FRE 687 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 1 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 1 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 1 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 |
| 36FRE 693 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| 37FRE 700 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 3 | 0 | 0 | 0 | 3 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 3 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 3 | 0 | 0 |
| | 1 | 0 | 2 | 0 | 0 | 0 | 0 | 0 | 2 | 0 | 0 | 0 | 0 |

Table 8 (continued)
RAW DATA

| Case | Number of issues | Pre-Code cases | Post-Code cases | Article/ Treatises | Suspenders | Contextuali-zation | Concreti-zation | Ambiguity/ Conflict | Lacuna | Supplement | Substitute | Transforma-tion | Noise |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | 1 | 0 | 2 | 0 | 2 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 1 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 1 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 1 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 |
| 36FRE 706 | 4 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 1 | 0 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 1 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 3 | 0 | 0 | 0 | 3 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 0 | 0 |
| | 1 | 0 | 5 | 0 | 0 | 0 | 0 | 5 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 1 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| 36FRE 719 | 2 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| 36FRE 724 | 2 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| 36FRE 726 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 4 | 0 | 0 | 0 | 2 | 0 | 0 | 0 | 2 | 0 | 0 |
| | 1 | 0 | 2 | 0 | 2 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 2 | 0 | 1 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 |
| 36FRE 739 | 1 | 0 | 2 | 0 | 2 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |

Table 5 (continued)
RAW DATA

| Case | Number of issues | Pre-Code cases | Post-Code cases | Article/ Treatises | Suspenders | Contextualization | Concretization | Ambiguity/ Conflict | Lacuna | Supplement | Substitute | Transformation | Noise |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 36FRE 743 | 3 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 0 |
| 36FRE 747 | 1 | 0 | 1 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 2 | 0 | 0 | 0 | 2 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 6 | 0 | 0 | 0 | 6 | 0 | 0 | 0 | 0 | 0 | 0 |
| 36FRE 753 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| 36FRE 757 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 1 | 1 | 2 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 1 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 8 | 0 | 0 | 0 | 8 | 0 | 0 | 0 | 0 | 0 | 0 |
| 36FRE 761 | 1 | 0 | 1 | 1 | 0 | 0 | 2 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 2 | 0 | 0 | 0 | 0 | 0 | 0 | 2 | 0 | 0 | 0 |
| | 1 | 0 | 1 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 |
| 36FRE 769 | 1 | 0 | 1 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| 36FRE 775 | 2 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| 36FRE 779 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 6 | 0 | 0 | 0 | 0 | 0 | 0 | 6 | 0 | 0 | 0 |
| 36FRE 800 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |

Table 8 (continued)
RAW DATA

| Case | Number of issues | Pre-Code cases | Post-Code cases | Article/ Treatises | Suspenders | Contextualization | Concretization | Ambiguity/ Conflict | Lacuna | Supplement | Substitute | Transformation | Noise |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | 1 | 0 | 2 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 2 | 0 |
| | 1 | 0 | 2 | 0 | 0 | 0 | 2 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 1 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 2 | 0 | 0 | 0 | 2 | 0 | 0 | 0 | 0 | 0 | 0 |
| 36FRE 808 | 1 | 0 | 2 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 2 | 0 | 0 |
| | 1 | 0 | 2 | 0 | 0 | 0 | 2 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 1 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 |
| 36FRE 814 | 1 | 0 | 1 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 1 | 5 | 0 | 0 | 0 | 6 | 0 | 0 | 0 | 0 | 0 | 0 |
| 36FRE 825 | 1 | 0 | 2 | 0 | 0 | 0 | 2 | 0 | 0 | 0 | 0 | 0 | 0 |
| . | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| 36FRE 845 | 1 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 0 |
| | 1 | 0 | 1 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 1 | 0 | 1 | 0 | 0 | 2 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 2 | 0 | 0 | 0 | 2 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 2 | 0 | 0 | 0 | 2 | 0 | 0 | 0 | 0 | 0 | 0 |
| 36FRE 852 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 2 | 0 | 0 | 0 | 2 | 0 | 0 | 0 | 0 | 0 | 0 |

Table 8 (continued)
RAW DATA

| Case | Number of issues | Pre-Code cases | Post-Code cases | Article/ Treatises | Suspenders | Contextuali-zation | Concreti-zation | Ambiguity/ Conflict | Lacuna | Supplement | Substitute | Transforma-tion | Noise |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | 1 | 0 | 2 | 0 | 0 | 0 | 0 | 2 | 0 | 0 | 0 | 0 | 0 |
| 36FRE 855 | 1 | 0 | 5 | 0 | 0 | 0 | 6 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 1 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 |
| 36FRE 885 | 1 | 0 | 2 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 2 | 0 | 0 | 0 | 2 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 2 | 0 | 0 | 0 | 2 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 1 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 1 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 |
| 36FRE 892 | 1 | 0 | 1 | 1 | 0 | 0 | 2 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 2 | 0 | 0 | 0 | 2 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 2 | 0 | 0 | 0 | 2 | 0 | 0 | 0 | 0 | 0 | 0 |
| 36FRE 930 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| 36FRE 939 | 1 | 0 | 1 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 10 | 1 | 0 | 0 | 11 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 1 | 10 | 0 | 0 | 0 | 11 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 1 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 5 | 0 | 0 | 0 | 0 | 0 | 5 | 0 | 0 | 0 | 0 |
| 36FRE 951 | 1 | 0 | 1 | 1 | 0 | 0 | 2 | 0 | 0 | 0 | 0 | 0 | 0 |

Table 8 (continued)
RAW DATA

| Case | Number of issues | Pre-Code cases | Post-Code cases | Article/ Treatises | Suspenders | Contextuali-zation | Concreti-zation | Ambiguity/ Conflict | Lacuna | Supplement | Substitute | Transforma-tion | Noise |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | 1 | 0 | 3 | 0 | 0 | 0 | 0 | 0 | 0 | 3 | 0 | 0 | 0 |
| | 1 | 0 | 1 | 1 | 0 | 0 | 0 | 0 | 0 | 2 | 0 | 0 | 0 |
| | 1 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 0 | 0 |
| | 1 | 0 | 1 | 0 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 |
| 36FRE 958 | 1 | 0 | 0 | 1 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 |
| 36FRE 976 | 1 | 0 | 2 | 0 | 2 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 1 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 |
| 36FRE 979 | 2 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 1 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 0 |
| | 1 | 0 | 1 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 1 | 0 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 |
| 36FRE 983 | 1 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 0 |
| | 1 | 3 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 3 | 0 | 0 |
| | 1 | 0 | 2 | 0 | 2 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 0 |
| | 2 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| 36FRE 991 | 1 | 0 | 4 | 2 | 0 | 0 | 6 | 0 | 0 | 0 | 0 | 0 | 0 |

Table 8 (continued)
RAW DATA

| Case | Number of issues | Pre-Code cases | Post-Code cases | Article/ Treatises | Suspenders | Contextuali-zation | Concreti-zation | Ambiguity/ Conflict | Lacuna | Supplement | Substitute | Transforma-tion | Noise |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | 7 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 2 | 1 | 0 | 0 | 0 | 3 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 1 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 1 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 |
| 36FRE 1010 | 1 | 1 | 4 | 1 | 0 | 0 | 0 | 0 | 0 | 6 | 0 | 0 | 0 |
| | 1 | 0 | 1 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 2 | 1 | 0 | 0 | 0 | 0 | 0 | 3 | 0 | 0 | 0 |
| 36FRE 1020 | 1 | 0 | 1 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 0 |
| 36FRE 1028 | 1 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 0 |
| | 1 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 0 |
| | 1 | 0 | 2 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 1 | 0 | 0 |
| | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| 36FRE 1032 | 1 | 0 | 1 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 3 | 0 | 0 | 0 | 3 | 0 | 0 | 0 | 0 | 0 | 0 |
| 36FRE 1034 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 1 | 0 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 |

Table 8 (continued)
RAW DATA

| Case | Number of issues | Pre-Code cases | Post-Code cases | Article/ Treatises | Suspenders | Contextualization | Concretization | Ambiguity/ Conflict | Lacuna | Supplement | Substitute | Transformation | Noise |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | 1 | 0 | 1 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 |
| 36FRE 1036 | 1 | 0 | 1 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 1 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 4 | 0 | 0 | 0 | 4 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 2 | 1 | 0 | 0 | 3 | 0 | 0 | 0 | 0 | 0 | 0 |
| 36FRE 1047 | 1 | 0 | 1 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 1 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 |
| 36FRE 1052 | 1 | 0 | 2 | 0 | 2 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 1 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 2 | 0 | 0 | 0 | 2 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 2 | 0 | 0 | 0 | 0 | 2 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 1 | 1 | 0 | 1 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| 36FRE 1058 | 5 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 0 |
| | 1 | 0 | 1 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 |

Table 8 (continued)
RAW DATA

| Case | Number of issues | Pre-Code cases | Post-Code cases | Article/ Treatises | Suspenders | Contextualization | Concretization | Ambiguity/ Conflict | Lacuna | Supplement | Substitute | Transformation | Noise |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | 1 | 0 | 1 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 1 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 0 |
| | 1 | 0 | 1 | 0 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 |
| 36FRE 1072 | 3 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 2 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 2 | 0 | 0 |
| | 1 | 0 | 1 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 1 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 1 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 1 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 |
| 36FRE 1081 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 3 | 0 | 3 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 1 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 |